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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER

Chairman

JIM IRVIN

Commissioner

WILLIAM A. MUNDELL

Commissioner

JEFF HATCH-MILLER

Commissioner

MIKE GLEASON

Commissioner

Arizona Corporation Commission

DOCKETED

JUN - 2 2003

DOCKETED BY

CAF

2003 JUN -2 A 4: 53

AZ CORP COMMISSION
DOCUMENT CONTROL

UTILITIES DIVISION STAFF,

Complainant,

vs.

Docket No. T-03889A-02-0796
T-04125A-02-0796

LIVEWIRENET OF ARIZONA, LLC n/k/a THE PHONE
COMPANY MANAGEMENT GROUP, LLC; THE PHONE
COMPANY OF ARIZONA JOINT VENTURE, d/b/a/ THE
PHONE COMPANY OF ARIZONA; ON SYSTEMS
TECHNOLOGY, LLC, and its principals, TIM
WETHERALD, FRANK TRICAMO, DAVID STAFFORD,
MARC DAVID SHINER and LEON SWICKOW; THE
PHONE COMPANY OF ARIZONA, LLP and its members

Respondents.

IN THE MATTER OF THE PHONE COMPANY OF
ARIZONA JOINT VENTURE d/b/a/ THE PHONE
COMPANY OF ARIZONA'S APPLICATION FOR
CERTIFICATE OF CONVENIENCE AND NECESSITY TO
PROVIDE INTRASTATE TELECOMMUNICATIONS
SERVICE AS A LOCAL AND LONG DISTANCE
RESELLER AND ALTERNATIVE OPERATOR SERVICE.

Docket No. T-04125A-02-0577

IN THE MATTER OF THE APPLICATION OF THE
PHONE COMPANY MANAGEMENT GROUP, LLC f/k/a
LIVEWIRENET OF ARIZONA, LLC TO DISCONTINUE
LOCAL EXCHANGE SERVICE.

Docket No. T-03889A-02-0578

IN THE MATTER OF THE APPLICATION OF THE
PHONE COMPANY MANAGEMENT GROUP, LLC FOR
CANCELLATION OF FACILITIES BASED AND RSOLD
LOCAL EXCHANGE SERVICES.

Docket No. T-03889A-03-0152

IN THE MATTER OF THE APPLICATION OF THE
PHONE COMPANY MANAGEMENT GROUP, LLC d/b/a/
THE PHONE COMPANY FOR THE CANCELLATION
OF ITS CERTIFICATE OF CONVENIENCE AND
NECESSITY.

Docket No. T-03889A-03-0202

STAFF'S FILING REGARDING
USURF, TELECOM ADVISORY
SERVICES, INC., AND MILE
HIGH TELECOM

1 On May 15, 2003, a procedural order issued ordering the Arizona Corporation Commission
2 (Commission) Utilities Division (Staff) to make several filings in this docket on or before June 2,
3 2003. The filings ordered are a filing regarding USURF, Inc., a filing regarding Telecom Advisory
4 Services, Inc., a filing regarding Mile High Telecom, Inc., and if PCMG failed to file the advice letter
5 of Tim Wetherald that was filed on March 25, 2003 in Docket No. T-03889A-00-0393 on or before
6 May 30, 2003, Staff is ordered to file same on or before June 2, 2003. This filing is in accordance
7 with those orders.

8
9 **USURF, Inc.**

10 USURF America Inc. ("USURF") is a publicly traded company that trades on the American
11 Stock Exchange under the symbol UAX. Prior to 2003 it appears that USURF's main line of
12 business involved the provisioning of wireless internet access. During 2003 USURF sought to
13 expand into Telecommunications. On March 7, 2003 USURF entered into an agreement to buy the
14 Arizona customers of Phone Company Management Group, LLC. (See Attachment 1). Since
15 USURF does not have a CC&N in Arizona they contracted with DMJ to provide service to the
16 purchased customers. In response to Staff's data request 3-7 which asked: "Provide any other
17 information that you believe should be considered by Staff as we prepare our filing regarding USURF
18 in response to the May 15, 2003 procedural order," USURF responded that they have no relationship
19 with any of the respondents listed in the May 15 Procedural Order. Further, USURF states that
20 representations made in the asset purchase agreement by PCMG were inaccurate and that PCMG may
21 be in breach of the agreement.

22 In a form 10KSB/A filed with the SEC by USURF America, Inc on May 9, 2003 USURF
23 stated that: "Since the end of 2002, we have acquired a competitive local exchange carrier (CLEC)
24 licensed in the State of Arizona and currently provide local telephone, long-distance and dial-up
25 Internet access to approximately 1,700 customers there. Our monthly revenues associated with these
26 customers is (sic) approximately \$75,000." (See Attachment 2). In response to Staff's data request
27 3-1 regarding USURF's apparent acquisition of an Arizona CLEC, USURF stated that they had in
28 fact not purchased any Arizona CLEC. (See Attachment 3). In their response to that data request

1 USURF identified several disclosures that Staff does not believe are relevant to their claim that they
2 purchased an Arizona CLEC. One of the disclosures that USURF pointed out stated that "We are in
3 the process of obtaining a CLEC license in Arizona." Staff is unaware of any application filed by
4 USURF to obtain a CC&N in Arizona. Staff believes that these discrepancies in USURF's 10KSB/A
5 should be brought to the attention of the SEC and other relevant agencies.

6 On January 29, 2003 USURF America, Inc. issued a press release titled "USURF America
7 Completes Acquisition of DMJ Communications." ' That press release refers only to DMJ's
8 operations in Colorado. In response to Staff data request 3-2, USURF avers that the acquisition of
9 DMJ's Colorado operations was never completed. (See Attachment 4).

10 In responses to Staff data requests 3-3, 3-4, and 3-5 USURF stated that they have no
11 relationship with David Shiner, Leon Swichkow, or Louis Stinson, Jr. P.A.

12 USURF is a "C" corporation and thus has no partners or members. In response to Staff Data
13 request 3-6 USURF provided the following list of past and present officers and directors:

14 **Current Officers and Directors**

15 Douglas O. McKinnon	Director, President, and Chief Executive Officer
16 David M. Loflin	Director, Chairman of the Board
17 Richard E. Wilson	Director, Elected March 2003
18 Ross S. Bravata	Director
19 Kenneth J. Upcraft	Executive Vice President
20 Christopher K. Bremmer	Vice President of Finance and Administration, Chief Financial Officer and Secretary

21 **Officers and Directors for Year Ended December 31, 2002**

22 Douglas O. McKinnon	Director, President, and Chief Executive Officer, Elected May 2002
23 David M. Loflin	Director, Chairman of the Board
24 Ross S. Bravata	Director
25 Kenneth J. Upcraft	Executive Vice President, Elected May 2002
26 Christopher K. Bremmer	Vice President of Finance and Administration, Chief Financial Officer and Secretary, elected December 2002
27 James Kaufman	Vice President of Corporate Development, Resigned June 2002
28 Waddell D. Loflin	Director, Resigned March 2003
Robert A. Hart IV	Vice President of Technology, Resigned May 2002

29 **Officers and Directors for Year Ended December 31, 2001**

30 David M. Loflin	Director, Chairman of the Board
31 Waddell D. Loflin	Director, Vice President and Secretary
32 Robert A. Hart IV	Vice President of Technology
33 James Kaufman	Vice President of Corporate Development,

Ross S. Bravata Director

Officers and Directors for Year Ended December 31, 2000

David M. Loflin	Director, Chairman President and Chief Executive Officer
Waddell D. Loflin	Director, Vice President and Secretary
Robert A. Hart IV	Vice President of Technology
James Kaufman	Vice President of Corporate Development,
Ross S. Bravata	Director
Micheal Cohn	Director

Officers and Directors for Year Ended December 31, 1999

David M. Loflin	Director, Chairman President and Chief Executive Officer
Waddell D. Loflin	Director, Vice President and Secretary
Christopher L Wiebelt	Vice President of Finance and CFO
Darrell D. Davis	Vice President- U.S. Internet Operations
James Kaufman	Vice President of Corporate Development
Ross S. Bravata	Director
Micheal Cohn	Director
Richard N. Gill	Director

Officers and Directors for Year Ended December 31, 1998

David M. Loflin	Director, Chairman President and Chief Executive Officer
Waddell D. Loflin	Director, Vice President and Secretary
Julius W. Basham, II	Director and Chief Operating Officer
James Kaufman	Vice President of Corporate Development
Alonzo B. See, III	CFO
Ross S. Bravata	Director
Micheal Cohn	Director
Richard N. Gill	Director

Officers and Directors for Year Ended December 31, 1997

David M. Loflin	Director, Chairman President and Chief Executive Officer
Waddell D. Loflin	Director, Vice President and Secretary
Ross S. Bravata	Director
Micheal Cohn	Director
Richard N. Gill	Director

Telecom Advisory Services, Inc.

Telecom Advisory Services, Inc. (TAS) was incorporated in Florida on February 26, 2001 by Louis Stinson, Jr. Officers of TAS were at the time of incorporation Louis Stinson, Jr., Director and Secretary and Statutory Agent, and Leon Swichkow, Director and President. TAS's annual report, filed April, 2002 indicates Stinson and Swichkow continued to hold the positions held at

1 incorporation. Although there is no filing with the Florida Secretary of State, the SEC complaint
2 filed with the Southern District of Florida Federal District Court indicates Marc David Shiner is now
3 the corporate secretary. (See Attachment 5). TAS has done business as Communications Response,
4 Inc., f/k/a USA Media Group, Inc., d/b/a Direct Media America. TAS is currently under
5 investigation by the Florida Attorney General on an allegation of unsolicited facsimile transmissions
6 and deceptive solicitation of business opportunity.

7 TAS has been named as a primary defendant in a complaint brought by the United States
8 Securities and Exchange Commission. The complaint alleges that TAS which is not registered as a
9 broker-dealer has actively marketed the sale of units in six Limited Liability Partnerships. The
10 partnerships include Mile High Telecom Partners, LLP; Phone Company of Arizona, LLP;
11 Washington Phone Company, LLP; Minnesota Phone Company, LLP; Iowa-Nebraska Phone
12 Company, LLP; and Oregon Phone Company Financial Group, LLP. Swichkow and Shiner are also
13 named as primary defendants in the complaint which alleges the two used boiler room techniques,
14 making material misrepresentations and omissions in their marketing efforts to unsuspecting
15 investors. Stinson is named as a relief defendant on allegations that his firm while maintaining the
16 escrow accounts for each of the six LLPs funneled the escrow accounts to various corporate entities
17 controlled by the primary defendants. The attached injunction details the activities of TAS and its
18 partners.

19 **Mile High Telecom**

20 Mile High Telecom Joint Venture provided telecommunications services as a Colorado
21 CLEC. The Joint Venture was comprised of two partners: On Systems Technology, LLC and Mile
22 High Telecom Partners, LLP (Mile High). As noted above, Mile High is one of the six LLPs
23 organized by TAS. Mile High was registered with the Colorado Secretary of State in February, 2001
24 with Tim Wetherald signing the registration form as "General Partner." Mile High's periodic report
25 was filed in August, 2002 and listed Frank Tricamo as the individual completing the report and Tim
26 Wetherald as the entity's Registered Agent. In September, 2002 Mile High filed a Statement of
27 Change of Registered Agent, changing the registered agent from Tim Wetherald to Patrick W.
28

1 Johnson. A list is attached of all Mile High partners, obtained from Mr. Johnson in response to a
2 Staff data request 1.1. (See Attachment 6).

3
4 The May 15, 2003 Procedural Order requires "that PCMG shall docket in this matter the
5 advice letter of Tim Wetherald that was filed on March 25, 2003 in Docket No. T-03889A-00-0393
6 on or before May 30, 2003. If PCMG fails to docket the letter, then Staff shall docket the letter on or
7 before June 2, 2003." It appears that PCMG has not docketed such letter. Staff researched docket
8 T-03889A-00-0393 and found no advice letter from Tim Wetherald filed March 25, 2003.

9 RESPECTFULLY SUBMITTED this 2nd day of June, 2003.

10 ARIZONA CORPORATION COMMISSION

11
12 By: 

13 Maureen A. Scott
14 Gary H. Horton
15 Attorney, Legal Division
16 1200 West Washington Street
17 Phoenix, Arizona 85007
18 (602) 542-6026
19
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23
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27
28

1 Original and 21 copies of the foregoing filed
2 This 2nd day of June, 2003, with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, Arizona 85007

7 Copy of the foregoing hand-delivered/mailed
8 This 2nd day of June, 2003, to:

9 Lyn Farmer
10 Chief Administrative Law Judge
11 Hearing Division
12 Arizona Corporation Commission
13 1200 West Washington
14 Phoenix, Arizona 85007

15 Ernest Johnson
16 Director, Utilities Division
17 Arizona Corporation Commission
18 1200 West Washington
19 Phoenix, Arizona 85007

20 Chairman Marc Spitzer
21 Commissioner Jim Irvin
22 Commissioner William A. Mundell
23 Commissioner Jeff Hatch-Miller
24 Commissioner Mike Gleason

25 Michael L. Glaser
26 Michael D. Murphy
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28 Denver, CO 80202
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Aurora, CO 80014

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LLC n/k/a LiveWireNet of Arizona, LLC

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Managing Partners Chairman
32321 County Highway 25
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The Phone Company of Arizona, LLP

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Brooklyn Park, MN 55444
The Phone Company of Arizona, LLP

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 N. Central, Suite 2600
Phoenix, AZ 85003-2913

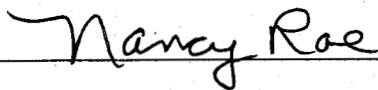
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9 Phoenix, AZ 85004

Thomas H. Campbell, Esq.
Snell & Wilmer
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400 East Van Buren
Phoenix, AZ 85004
Attorneys for DJM

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ATTACHMENT 1

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement is entered into by and between The Phone Company Management Group, LLC, an Arizona limited liability company ("Phone Company") and USURF America, Inc., a Nevada corporation ("UAX"), in light of the following facts:

WHEREAS, Phone Company owns certain assets, free and clear of any liens or encumbrances, as more fully described and set forth in Exhibit "A" attached hereto and incorporated herein by this reference (the "Assets"); and

WHEREAS, Phone Company desires to sell all of the Assets to UAX in exchange for the consideration described in this Agreement;

WITNESSETH:

THEREFORE, the agreement of the parties, the promises of each being consideration for the promises of the other:

I. DEFINITIONS

Whenever used in this Agreement, the following terms shall have the meanings set forth below:

- (a) "Agreement" shall mean this Asset Purchase Agreement and all exhibits hereto or amendments hereto.
- (b) "UAX" shall mean USURF America, Inc., a Nevada corporation
- (c) "Phone Company" shall mean The Phone Company Management Group, LLC, an Arizona limited liability company.
- (d) "Knowledge of Phone Company" or matters "known to Phone Company" shall mean matters actually known to the Members or officers of Phone Company, or which reasonably should be or should have been known by them upon reasonable investigation.
- (e) "Securities Act" shall mean the Securities Act of 1933, as amended, and includes the rules and regulations of the Securities and Exchange Commission promulgated thereunder, as such shall then be in effect.
- (f) "Colorado Act" shall mean the Securities Act of Colorado, and includes the rules and regulations of the Colorado Securities Commission promulgated thereunder, as such shall then be in effect.

Any term used herein to which a special meaning has been ascribed shall be construed in accordance with either (i) the context in which such term is used, or (ii) the definition provided for such term in the place in this Agreement at which such term is first used.

II. PURCHASE AND SALE

(a) Subject to all of the terms and conditions set forth herein, Phone Company hereby sells to UAX and UAX hereby buys from Phone Company the Assets, for the consideration set forth in Exhibit "B" attached hereto and incorporated herein by this reference (the "Consideration").

(b) UAX does not assume, and shall not be responsible for, the payment, performance or discharge of any liabilities or obligations of Phone Company, whether existing at the date of the Exchange or arising thereafter.

PHONE COMPANY

ASSET PURCHASE AGREEMENT -- PAGE 1

III. THE EXCHANGE

(a) Phone Company agrees to deliver to UAX a Bill of Sale in favor of UAX, or its assign, reflecting the transfer of the Assets. Upon delivery of such Bill of Sale by Phone Company, UAX shall deliver to Phone Company the Consideration. The deliveries described in the foregoing sentences shall be referred to herein as the "Exchange." The Exchange shall take place in the office of Phone Company on the 7th day of March, 2003.

(b) After the Exchange, the Parties shall execute and deliver such additional documents and take such additional actions as may reasonably be deemed necessary or advisable by any party to consummate the transaction contemplated by this Agreement and to vest more fully in UAX or its assign the ownership of the Assets transferred and conveyed, or intended to be conveyed, pursuant to this Agreement.

IV. REPRESENTATIONS AND WARRANTIES OF PHONE COMPANY

Phone Company represents and warrants to UAX:

(a) Organization and Corporate Authority. Phone Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Arizona. Phone Company has all requisite corporate power and authority, governmental permits, consents, authorizations, registrations, licenses and memberships necessary to own its property and to carry on its business in the places where such properties are now owned and operated or such business is being conducted.

(b) Status of Assets. At the time of the Exchange (as that term is defined herein), Phone Company will own the Assets (Exhibit "A") free and clear of any encumbrances.

(c) Compliance with Agreements. The execution and performance of this Agreement will not result in any violation of, or be in conflict with, any agreement to which Phone Company is a party.

(d) Authorization. All corporate action on the part of Phone Company and its officers, directors and interest holders necessary for the authorization, execution and delivery of this Agreement, for the performance of Phone Company's obligations hereunder and for the delivery of the Bill of Sale has been taken. This Agreement, when executed and delivered, shall constitute a legal, valid and binding obligation of Phone Company.

(e) Investment Intent of Phone Company. Phone Company represents and warrants that the shares of UAX common stock acquired hereunder by Phone Company will be held by it solely for its own account for investment purposes only and not for the account of any other person and not for distribution, assignment or resale to others.

(f) Review of Public Information. Phone Company hereby represents and warrants that it has received and reviewed (1) UAX's last-filed Annual Report on Form 10-KSB, as filed with the Securities and Exchange Commission ("SEC"), (2) UAX's Quarterly Reports on Form 10-QSB, as filed with the SEC, and (3) UAX's Current Reports on Form 8-K, as amended and as filed with the SEC. With respect to such information, Phone Company further represents and warrants that it has had an opportunity to ask questions of, and to receive answers from, the officers of USURF and UAX.

(g) Restrictive Legend. Phone Company further consents to the placement of the following legend, or a legend similar thereto, on the certificate or certificates representing shares of UAX common stock deliverable hereunder:

"THESE SECURITIES HAVE BEEN ISSUED IN RELIANCE UPON THE EXEMPTION FROM REGISTRATION AFFORDED BY SECTION 4(2) OF THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE TRANSFERRED WITHOUT AN OPINION OF COUNSEL SATISFACTORY TO THE CORPORATION TO THE EFFECT THAT ANY SUCH PROPOSED TRANSFER IS IN ACCORDANCE WITH ALL APPLICABLE LAWS, RULES AND REGULATIONS."

PHONE COMPANY

ASSET PURCHASE AGREEMENT - PAGE 2

(h) Accuracy of Information. No representation or warranty by Phone Company in, pursuant to, or in contemplation of this Agreement contains any untrue statement of a material fact or omits to state any material fact necessary to make the statements herein, in light of the circumstances under which they were made, not false or misleading. To the knowledge of Phone Company, Phone Company has disclosed to UAX all facts known to it that are material to the Assets transferred and conveyed pursuant to this Agreement.

V. REPRESENTATIONS AND WARRANTIES OF UAX

UAX represents and warrants to Phone Company:

(a) Organization and Corporate Authority. UAX is a corporation duly organized, validly existing and in good standing under the laws of the State of Nevada. UAX has all requisite corporate power and authority, governmental permits, consents, authorizations, registrations, licenses and memberships necessary to own its property and to carry on its business in the places where such properties are now owned and operated or such business is being conducted.

(b) Issuance of the Common Stock. The shares of \$.0001 par value common stock of UAX to be issued hereunder, when issued and delivered in accordance with this Agreement, will be duly and validly issued, fully paid and non-assessable, and will be free and clear of any liens or encumbrances and, to the knowledge of UAX, will be issued in compliance with applicable state and federal laws.

(c) Compliance with Agreements. The execution and performance of this Agreement will not result in any violation or be in conflict with any agreement to which UAX is a party.

(d) Authorization. All corporate action on the part of UAX and its officers, directors and shareholders necessary for the authorization, execution and delivery of this Agreement, for the performance of UAX's obligations hereunder and for the issuance and delivery of the \$.0001 par value common stock of UAX has been taken. This Agreement, when executed and delivered, shall constitute a legal, valid and binding obligation of UAX.

(e) Legality of Share Issuance. UAX warrants that the common stock to be issued to Phone Company hereunder will be legally issued without registration under the Securities Act or the Colorado Act pursuant to applicable exemptions from registration thereunder.

(f) Assignment of Assets. UAX represents and warrants that the Assets will, immediately upon consummation of the transactions contemplated herein, assign all of the Assets to a competitive local exchange carrier ("CLEC") duly licensed as such in the State of Arizona. Specifically, UAX represents and warrants that the Assets will be administered on its behalf, pursuant to a existing agency agreement, by DMJ Communications, Inc., a licensed CLEC in the State of Arizona.

VI. INDEMNIFICATION

Phone Company shall indemnify, defend and hold UAX, and each of its officers, directors, affiliates, employees, agents and shareholders, harmless from and against any and all losses, liabilities, damages, costs and expenses resulting from or arising out of or in connection with:

(a) any misrepresentation or breach by Phone Company of any warranty or covenant contained in this Agreement or any other document executed, delivered or furnished by Phone Company in connection herewith;

(b) income, franchise, sales, use or other taxes, including any penalties or interest with respect thereto, of or relating to the Assets prior to the date of the Exchange; and

(c) liabilities and obligations related to the Assets and arising before the date of the Exchange.

PHONE COMPANY

ASSET PURCHASE AGREEMENT - PAGE 3

VII. MISCELLANEOUS

(a) Notices. All notices hereunder shall be in writing and addressed to the party at the address herein set forth, or at such other address as to which notice pursuant to this section may be given, and shall be given by personal delivery, by certified mail (return receipt requested), Express Mail or by national or international overnight courier. Notices will be deemed given upon the earlier of actual receipt or three (3) business days after being mailed or delivered to such courier service. Notices shall be addressed as follows:

to Phone Company at:

The Phone Company Management Group, LLC
3025 S Parker Rd.
Suite 1000
Aurora, Colorado 80014

to UAX at:

USURF America, Inc.
Attention: Douglas O. McKinnon
6005 Delmonico, Suite 140
Colorado Springs, Colorado 80919

with a copy to:

Newlan & Newlan, Attorneys at Law
819 Office Park Circle
Lowinville, Texas 75057

(b) Survival of Covenants. All covenants, agreements, representations and warranties of the parties made in this Agreement and in the financial statements or other written information delivered or furnished in connection therewith and herewith shall survive the Exchange hereunder, and shall be binding upon, and inure to the benefit of, the parties and their respective successors and assigns.

(c) Further Assurances. Each party shall do and perform, or cause to be done and performed, all such further acts and things, and shall execute and deliver all such other agreements, certificates, instruments and documents, as the other party may reasonably request in order to carry out the intent and accomplish the purposes of this Agreement and the consummation of the transactions contemplated hereby.

(d) Arbitration. The parties agree that any dispute arising between or among them related to this Agreement or the performance hereof shall be submitted for resolution to the American Arbitration Association for arbitration in the Denver, Colorado, office of the Association under the then-current rules of commercial arbitration. The Arbitrator or Arbitrators shall have the authority to award to the prevailing party its reasonable costs and attorneys fees. Any award of the Arbitrators may be entered as a judgment in any court competent jurisdiction.

(e) Governing Law. This Agreement shall be deemed to be a contract made under, governed by and construed in accordance with the substantive laws of the State of Colorado.

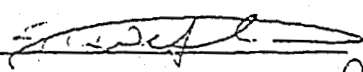
(f) Counterparts. This Agreement may be executed simultaneously in counterparts, each of which when so executed and delivered shall be taken to be an original; but such counterparts shall together constitute but one and the same document.

(g) Successors and Assigns. Except as otherwise expressly provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors or assigns of the parties hereto.

(h) Entire Agreement. This Agreement constitutes the full and entire understanding and agreement between the parties with regard to the subject matter hereof.

IN WITNESS WHEREOF, the parties have signed this Agreement as of the date written below.

THE PHONE COMPANY MANAGEMENT GROUP, LLC
(an Arizona limited liability company)

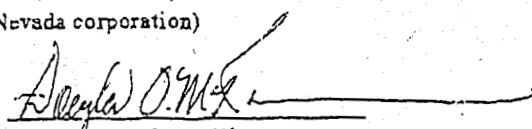
By: 

Name: Tina Wetherford

Title: Manager

DATE: MARCH 7, 2003

USURF AMERICA, INC.
(a Nevada corporation)

By: 
Douglas O. McKinnon
President and CEO

DATE: MARCH 7, 2003

PHONE COMPANY

ASSET PURCHASE AGREEMENT - PAGE 5

EXHIBIT "A"

LIST OF ASSETS

Assets of Phone Company

The Assets to be acquired by UAX from Phone Company are:

1. The customers listed in Annex A-I to this Exhibit "A".
2. The accounts and account balances related to the customers listed in Annex A-I to this Exhibit "A".

Exhibit "B"

Consideration

Annex "B-1"
Consideration

UAX will pay Phone Company \$200.00 per acquired customer that remains as a paying customer of UAX on the date that is 90 days after the execution of the Asset Purchase Agreement (the "Agreement"), to which this Annex B-1 relates, as follows:

1. Cash in the amount of \$154.00, payable in 24 monthly installments of \$7.00 (the "Royalty"); and
2. A number of shares of UAX common stock that has a value of \$46.00, based on the closing price of UAX common stock, as reported by the American Stock Exchange, on the trading day that immediately precedes the 90th day following the execution of the Agreement. By way of example only, should the closing price of UAX common stock be \$.10 per share, then UAX would issue to Phone Company a total of 460 shares per customer [$\$46.00 \div \$.10 = 460$].

It is agreed by UAX and Phone Company that UAX's duty to pay the Royalty with respect to any customer shall continue only for so long as any such customer shall remain a paying customer of UAX, up to a maximum of 24 months, and shall be payable out of collected cash only. Phone Company agrees that, on the date that is 90 days after the execution of the Agreement, USURF shall be entitled to prepay, in whole or in part, the future Royalty with respect any or all of the acquired customers by the issuance of shares of its common stock (on a per share value as set forth in paragraph 2 above), in its sole discretion.

It is further agreed by UAX and Phone Company that the consideration paid per customer shall be subject to adjustment to reflect the results of an independent fair market valuation of the acquired customers. Notwithstanding the foregoing, the parties agree that the per customer valuation will be no less than \$200 per customer. The adjustment in the valuation of the acquired customers, if any, shall be implemented on the date that is 90 days after the execution of the Agreement.

During the period of transition of the acquired customers' accounts, Phone Company agrees that it shall continue to provide Internet and long-distance service to such acquired customers at the expense of UAX. UAX agrees that it shall promptly and completely compensate Phone Company for providing such services to the acquired customers.

The accounts receivable associated with the acquired customers are considered to be an integral part of the customer base, however UAX and Phone Company agree that UAX will pay to Phone Company 30% of cash receipts as received for a period of 90 days from the date hereof.

STOCK PURCHASE AGREEMENT

This Stock Purchase Agreement is entered into by and between DMJ Communications, Inc. ("DMJ"), a Texas Corporation and a wholly owned subsidiary of PalomaNet International, Inc. ("PalomaNet"), a Colorado corporation, and USURF America, Inc., a Nevada corporation ("USURF"), in light of the following facts:

WHEREAS, prior to the time of this Agreement, DMJ has been a competitive local exchange carrier (CLEC) licensed in Colorado, providing local and long-distance telephone service throughout Colorado; and

WHEREAS, in contemplation of this Agreement, DMJ has organized DMJ Communications (Colorado), Inc., a Colorado corporation ("DMJ Colorado"), and transferred to DMJ Colorado certain assets listed in Exhibit "A" attached hereto (the "Assets") applicable to DMJ's operating as a CLEC in the State of Colorado, to the effect that DMJ Colorado has become a duly licensed CLEC in the State of Colorado;

WHEREAS, DMJ is the owner of all of the capital stock of DMJ Colorado; and

WHEREAS, DMJ desires to sell all of the capital stock of DMJ Colorado to USURF in exchange for cash and shares of common stock of USURF;

WITNESSETH:

THEREFORE, the agreement of the parties, the promises of each being consideration for the promises of the other:

I. DEFINITIONS

Whenever used in this Agreement, the following terms shall have the meanings set forth below:

- (a) "Agreement" shall mean this Stock Purchase Agreement and all exhibits hereto or amendments hereof.
- (b) "USURF" shall mean USURF America, Inc., a Nevada corporation.
- (c) "DMJ" shall mean DMJ Communications, Inc., a Colorado corporation wholly owned by PalomaNet International, Inc., a Colorado corporation.
- (d) "DMJ Colorado" shall mean DMJ Communications (Colorado), Inc., a Colorado corporation wholly owned by DMJ Communications, Inc., a Colorado corporation.
- (e) "PalomaNet" shall mean PalomaNet International, Inc., a Colorado corporation.
- (f) "Knowledge of DMJ" or matters "known to DMJ" shall mean matters actually known to the Board of Directors or officers of PalomaNet or the Board of Directors or officers of DMJ, or which reasonably should be or should have been known by them upon reasonable investigation.
- (g) "Securities Act" shall mean the Securities Act of 1933, as amended, and includes the rules and regulations of the Securities and Exchange Commission promulgated thereunder, as such shall then be in effect.

(h) "Colorado Act" shall mean the Securities Act of Colorado, and includes the rules and regulations of the Colorado Securities Commission promulgated thereunder, as such shall then be in effect.

Any term used herein to which a special meaning has been ascribed shall be construed in accordance with either (i) the context in which such term is used, or (ii) the definition provided for such term in the place in this Agreement at which such term is first used.

II DISCLOSURES

(a) At the time of the Exchange (as that term is defined herein) hereunder, DMJ Colorado will own all of the Assets (Exhibit "A"), will have the status of a CLEC and will have a valid and subsisting Certificate issued by the Colorado Public Utilities Commission to so operate. Also at the time of the Exchange hereunder, DMJ Colorado will be providing local and long-distance telephone service to approximately 100 customers, which customers are "prepaid" customers. DMJ represents and warrants that the contracts included in Exhibit "B" attached hereto and incorporated by this reference between DMJ, and by assignment DMJ Colorado, and Qwest Communications are in full force and effect, that DMJ and DMJ Colorado, and each of them, are not in breach of any of such contracts and that the consummation of the transactions contemplated by this Agreement will not constitute an event of default under any of such contracts.

(b) DMJ hereby represents and warrants that it has received and reviewed (1) USURF's last-filed Annual Report on Form 10-KSB, as filed with the Securities and Exchange Commission ("SEC"), (2) USURF's Quarterly Reports on Form 10-QSB, as filed with the SEC, and (3) USURF's Current Reports on Form 8-K, as amended and as filed with the SEC. With respect to such information, DMJ further represents and warrants that it has had an opportunity to ask questions of, and to receive answers from, the officers of USURF.

III PURCHASE AND SALE

(a) Subject to all of the terms and conditions set forth herein, DMJ hereby sells to USURF and USURF hereby buys from DMJ all of the shares of capital stock of DMJ Colorado in consideration of (i) \$20,000 in cash and (ii) the number of shares of the \$.0001 par value common stock of USURF determined pursuant to paragraph (b) below.

(b) At the Exchange (as that term is defined in Section IV:

- (i) DMJ shall deliver to USURF a certificate or certificates, duly endorsed to USURF, representing all of the outstanding capital stock of DMJ Colorado; and
- (ii) USURF shall deliver to DMJ (A) \$20,000 in cash and (B) shares of common stock of USURF with a value of \$30,000. For purposes of this Agreement, the number of shares of USURF common stock deliverable to DMJ at the Exchange shall be calculated as follows:
\$30,000 divided by the closing price per share of USURF's common stock, as reported by the American Stock Exchange, on the date of the mutual execution of this Agreement.

By way of example only, on the date of the mutual execution of this Agreement, should the closing price of USURF's common stock be \$.10 per share, USURF would be required to deliver a total of 300,000 shares of its common stock to DMJ [$\$30,000 \div \$.10/\text{share} = 300,000 \text{ shares}$].

IV. THE EXCHANGE

DMJ agrees to deliver to USURF duly endorsed stock certificates representing all of the outstanding capital stock of DMJ Colorado. Upon delivery of such stock certificates by DMJ, USURF shall deliver to DMJ the sum of \$20,000 in cash and a certificate representing the appropriate number of shares of the common stock of USURF. The deliveries described in the foregoing sentences shall be referred to herein as the "Exchange".

V. REPRESENTATIONS AND WARRANTIES OF DMJ

DMJ represents and warrants to USURF:

(a) Organization and Corporate Authority. DMJ is a corporation duly organized, validly existing and in good standing under the laws of the State of Colorado. DMJ has all requisite corporate power and authority, governmental permits, consents, authorizations, registrations, licenses and memberships necessary to own its property and to carry on its business in the places where such properties are now owned and operated or such business is being conducted. DMJ further represents and warrants that DMJ Colorado is a corporation duly organized, validly existing and in good standing under the laws of the State of Colorado and that DMJ Colorado has all requisite corporate power and authority, governmental permits, consents, authorizations, registrations, licenses and memberships necessary to own its property and to carry on its business in the places where such properties are now owned and operated or such business is being conducted.

(b) Status of CLEC License of DMJ Colorado. DMJ represents and warrants that the CLEC license granted by the State of Colorado to DMJ, which license has been validly transferred to DMJ Colorado in contemplation of this Agreement, remains valid and that the consummation of the transactions contemplated by this Agreement will have no adverse effect upon such CLEC license.

(c) Status of Qwest Communications Interconnection Contracts. DMJ represents and warrants that each of the interconnection contracts included in Exhibit "B" hereto between DMJ and Qwest Communications has been duly assigned by DMJ to DMJ Colorado, that such assignments did not constitute a breach or event of default under any one or more of such interconnection contracts and that each such interconnection contracts remains in full force and effect.

(d) Common Stock of DMJ Colorado. The shares of common stock of DMJ Colorado to be delivered hereunder, when delivered in accordance with this Agreement, will be duly and validly issued, fully paid and non-assessable, and will be free and clear of any liens or encumbrances and, to the knowledge of DMJ, will be delivered in compliance with applicable state and federal laws.

(e) Compliance with Agreements. The execution and performance of this Agreement will not result in any violation of, or be in conflict with, any agreement to which DMJ and/or DMJ Colorado is a party.

(f) Authorization. All corporate action on the part of DMJ and its officers, directors and shareholders necessary for the authorization, execution and delivery of this Agreement, for the performance of DMJ's obligations hereunder and for the delivery of the common stock of DMJ Colorado. This Agreement, when executed and delivered, shall constitute a legal, valid and binding obligation of DMJ.

(g) Legality of Share Delivery. DMJ warrants that the common stock of DMJ Colorado to be delivered hereunder will be legally delivered without registration under the Securities Act or the Colorado Act pursuant to applicable exemptions from registration thereunder.

(h) Investment Intent of DMJ. DMJ represents and warrants that the shares of USURF common stock acquired hereunder by DMJ are being purchased by it solely for its own account for investment purposes only and not for the account of any other person and not for distribution, assignment or resale to others.

(i) Restrictive Legend. DMJ further consents to the placement of the following legend, or a legend similar thereto, on the certificate or certificates representing shares of USURF common stock deliverable hereunder:

"THESE SECURITIES HAVE BEEN ISSUED IN RELIANCE UPON THE EXEMPTION FROM REGISTRATION AFFORDED BY SECTION 4(2) OF THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE TRANSFERRED WITHOUT AN OPINION OF COUNSEL SATISFACTORY TO THE CORPORATION TO THE EFFECT THAT ANY SUCH PROPOSED TRANSFER IS IN ACCORDANCE WITH ALL APPLICABLE LAWS, RULES AND REGULATIONS."

VI REPRESENTATIONS AND WARRANTIES OF USURF

USURF represents and warrants to DMJ:

(a) Organization and Corporate Authority. USURF is a corporation duly organized, validly existing and in good standing under the laws of the State of Nevada. USURF has all requisite corporate power and authority, governmental permits, consents, authorizations, registrations, licenses and memberships necessary to own its property and to carry on its business in the places where such properties are now owned and operated or such business is being conducted.

(b) Issuance of the Common Stock. The shares of \$.0001 par value common stock of USURF to be issued hereunder, when issued and delivered in accordance with this Agreement, will be duly and validly issued, fully paid and non-assessable, and will be free and clear of any liens or encumbrances and, to the knowledge of USURF, will be issued in compliance with applicable state and federal laws.

(c) Compliance with Agreements. The execution and performance of this Agreement will not result in any violation or be in conflict with any agreement to which USURF is a party.

(d) Authorization. All corporate action on the part of USURF and its officers, directors and shareholders necessary for the authorization, execution and delivery of this Agreement, for the performance of USURF's obligations hereunder and for the issuance and delivery of the \$.0001 par value common stock of USURF. This Agreement, when executed and delivered, shall constitute a legal, valid and binding obligation of USURF.

(e) Legality of Share Issuance. USURF warrants that the common stock to be issued to DMJ hereunder will be legally issued without registration under the Securities Act or the Colorado Act pursuant to applicable exemptions from registration thereunder.

(f) Investment Intent of USURF. USURF represents and warrants that the shares of DMJ Colorado common stock acquired hereunder by USURF are being purchased by it solely for its own account for investment purposes only and not for the account of any other person and not for distribution, assignment or resale to others.

(g) Restrictive Legend. USURF further consents to the placement of the following legend, or a legend similar thereto, on the certificate or certificates representing shares of DMJ Colorado common stock deliverable hereunder:

"THESE SECURITIES HAVE BEEN ISSUED IN RELIANCE UPON THE EXEMPTION FROM REGISTRATION AFFORDED BY SECTION 4(2) OF THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE TRANSFERRED WITHOUT AN OPINION OF COUNSEL SATISFACTORY TO THE CORPORATION TO THE EFFECT THAT ANY SUCH PROPOSED TRANSFER IS IN ACCORDANCE WITH ALL APPLICABLE LAWS, RULES AND REGULATIONS."

VII. MISCELLANEOUS

(a) All notices hereunder shall be in writing and addressed to the party at the address herein set forth, or at such other address as to which notice pursuant to this section may be given, and shall be given by personal delivery, by certified mail (return receipt requested), Express Mail or by national or international overnight courier. Notices will be deemed given upon the earlier of actual receipt of three (3) business days after being mailed or delivered to such courier service.

Notices shall be addressed to DMJ at: DMJ Communications, Inc.

Attention: Mr. Clyde Pittman

and to the USURF at:

USURF America, Inc.

Attention: Douglas O. McKinnon, President and CEO

6005 Delmonico, Suite 140

Colorado Springs, Colorado 80919

with a copy to: Newlan & Newlan, Attorneys at Law

819 Office Park Circle

Lewisville, Texas 75057

(b) Nothing in this Agreement shall be construed as prohibiting PalomaNet, DMJ, or any entity owned or controlled by either of the above-named companies, whether currently in existence or created in the future, from securing CLEC status within the State of Colorado and from entering into competition with DMJ Colorado. The Parties further agree that pending a decision to secure an additional CLEC certification by PalomaNet, DMJ, or any owned or controlled by either of the above-named companies, whether currently in existence or created in the future, DMJ Colorado will allow any of the above-named entities to operate as a telecommunications provider within the State of Colorado as an agent of DMJ Colorado upon terms and conditions to be agreed between the Parties. The Parties agree that terms and conditions will reflect common practice within the telecommunications industry for such a relationship as contemplated in this paragraph.

(c) Approvals: Notwithstanding the above, the consummation of the transactions contemplated by the Agreement may be subject to the approval of the Colorado PUC and/or other instrumentalities of the State of Colorado. If such approvals are required, the effective date of this agreement shall be the date of said approvals; however, for accounting and reporting purposes, the transaction shall be the Exchange date.

(d) Survival of Covenants. Unless otherwise waived as provided herein, all covenants, agreements, representations and warranties of the parties made in this Agreement and in the financial statements or other written information delivered or furnished in connection therewith and herewith shall survive the Exchange hereunder, and shall be binding upon, and inure to the benefit of, the parties and their respective successors and assigns.

(e) Arbitration. The parties agree that any dispute arising between or among them related to this Agreement or the performance hereof shall be submitted for resolution to the American Arbitration Association for arbitration in the Denver, Colorado, office of the Association under the then-current rules of arbitration. The Arbitrator or Arbitrators shall have the authority to award to the prevailing party its reasonable costs and attorneys fees. Any award of the Arbitrators may be entered as a judgment in any court competent jurisdiction.

(f) Governing Law. This Agreement shall be deemed to be a contract made under, governed by and construed in accordance with the substantive laws of the State of Colorado.

(g) Counterparts. This Agreement may be executed simultaneously in counterparts, each of which when so executed and delivered shall be taken to be an original; but such counterparts shall together constitute but one and the same documents.

(h) Successors and Assigns. Except as otherwise expressly provided herein, the provisions hereof shall inure to the benefit of, and be binding upon, the successors or assigns of the parties hereto.

(i) Entire Agreement. This Agreement, the other agreements and the other documents delivered pursuant hereto and thereto constitute the full and entire understanding and agreement between the parties with regard to the subjects hereof and thereof.

IN WITNESS WHEREOF, the parties have signed this Agreement as of the date(s) written below.

DMJ COMMUNICATIONS, INC.

(a Colorado corporation)

By: _____

Name: Clyde Pittman

Title: President and CEO

DATE: JANUARY __, 2003

USURF AMERICA, INC.

(a Nevada corporation)

By: _____

Name: Douglas O. McKinnon

Title: President and CEO

DATE: JANUARY __, 2003

EXHIBIT "A"
LIST OF ASSETS OWNED BY
DMJ COMMUNICATIONS (COLORADO), INC.

**LIST OF ASSETS OWNED BY
DMJ COMMUNICATIONS (COLORADO), INC.**

- Certification granted by the State of Colorado to DMJ Communications, Inc. (DMJ) to operate as a facilities-based Competitive Local Exchange Carrier (CLEC). The Certification was originally granted to DMJ by the Public Utilities Commission of Colorado (PUC).
- Rights to and all copies of all tariffs filed by DMJ with the PUC in association with applications for said Certifications.
- Interconnection agreements with Qwest Communications received by DMJ from Qwest pursuant to the granting of the Certification and its amendments from the PUC.
- All Billing Account Numbers (BANs) associated with the Qwest Interconnection Agreements.
- All Colorado customers.
- All other legal and administrative assets and assistance needed from PalomaNet and DMJ to assure that USURF will have full access to the current and intended use of the Interconnection Agreements and the Certifications.

In addition, PalomaNet and DMJ agree that all of DMJ Colorado's provisioning and customer care functions will remain within the province of PalomaNet for a period of time to be negotiated by PalomaNet/DMA and USURF, and for which PalomaNet/DMJ will receive ongoing consideration to be negotiated.

EXHIBIT "B"
COPIES OF CONTRACTS BETWEEN
DMJ COMMUNICATIONS, INC. AND
QWEST COMMUNICATIONS

ATTACHMENT 2

10KSB/A 1 may910ksba.htm

U.S. SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 10-KSB/A

- ☒ Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2002
- ☐ Transition Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Transition Period From _____ to _____

Commission File No. 1-15383

USURF America, Inc.

(Name of Small Business Issuer in its Charter)

Nevada

91-2117796

(State or Other Jurisdiction of
Incorporation or Organization)(IRS Employer Identification
Number)6005 Delmonico Drive, Suite 140, Colorado Springs, Colorado
80919

(Address of Principal Executive Offices, Including Zip Code)

(719) 260-6455

(Issuer's Telephone Number, Including Area Code)

Securities Registered under Section 12(b) of the Exchange Act:

Title of Each Class	Name of Exchange on Which Registered
Common Stock	The American Stock Exchange

Securities Registered under Section 12(g) of the Exchange Act: None

Check whether the issuer (1) filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act during the past 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject of such filing requirements for the past 90 days. Yes ☒ No ☐

Check if there is no disclosure of delinquent filers in response to Item 405 of Regulation S-B contained in this form, and no disclosure will be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-KSB

September 30, 2002	.11	.04
December 31, 2002	.13	.04
March 31, 2003	.09	.05

You should note that our common stock, like many technology-related stocks, has experienced significant fluctuations in its price and trading volume. We cannot predict the future trading patterns of our common stock.

Holdings

On April 10, 2003, the number of record holders of our common stock, excluding nominees and brokers, was 1,194, holding 77,797,203 shares.

Dividends

We have never paid cash dividends on our common stock. We intend to re-invest any future earnings for the foreseeable future.

Our board of directors has declared property dividends, the values of which have been written-off in our financial statements, comprised of common stock of three private companies acquired by us. These dividends of stock are: 1,500,000 shares of New Wave Media Corp., acquired by us in exchange for all of our community-television-related assets; 400,000 shares of Argo Petroleum Corporation, acquired by us in exchange for 10,000 shares of our common stock; and 800,000 shares of Woodcomm International, Inc., acquired by us in exchange for 7,500 shares of our common stock.

None of the three dividend distributions will occur unless and until a registration statement relating to each distribution transaction has been declared effective by the SEC.

Item 6. Management's Discussion and Analysis of Financial Condition and Results of Operations

Background

During 2001 and the first quarter of 2002, we focused all of our efforts and capital on the exploitation of our wireless Internet access products. Beginning in April 2002, with the arrival of our new president, we began to expand our business. By the beginning of 2003, we had become a provider of broad range of telecommunications services.

Current Overview

We currently operate as a provider of voice (telephone), video (cable television) and data (Internet) services to business and residential customers. We also market and sell telecommunications-related hardware and software.

Our business plan involves obtaining, through internal growth, as many voice, video and data customers as possible. Our growth strategy also includes acquisitions of telecommunications-related businesses and/or properties which would provide an immediate or potential customer base for our services.

In early 2003, we restructured our operations by creating three new subsidiary corporations that reflect our operating divisions. In the future, our reports on operations can be expected to contain business segment information. However, for 2002 and 2001, no discussion of business segment operations appears.

Since the end of 2002, we have acquired a competitive local exchange carrier (CLEC) licensed in the State of Arizona and currently provide local telephone, long-distance and dial-up Internet access to approximately 1,700 customers there. Our monthly revenues associated with these customers is approximately \$75,000. Also, we acquired assets from a telecommunications company that have enabled us to begin to operate as a seller of telecommunications-related hardware and software. We offer a broad array of products and the start to this part of our business has shown some success. In March 2003, we booked approximately \$45,000 in equipment sales. We have begun to build our wireless Internet network in Denver. Also, we have begun to build our wireless Internet network in Colorado Springs. We have become the preferred telecommunications services provider in four Denver-area MDU properties, providing voice, video and data services to these properties. In the aggregate, we now provide cable television services to approximately 160 customers in Denver.

First Fusion Capital Financing Transaction

In May 2001, we entered into an amended and restated common stock purchase agreement with Fusion Capital, pursuant to which Fusion Capital agreed to purchase up to \$10 million of our common stock. The selling price of the shares was equal to a price based upon the market price of our common stock without any fixed discount to the market price. In March 2003, this agreement ended, with Fusion Capital having purchased all 6,000,000 shares available for sale under the agreement for cash in the total amount of approximately \$585,000.

As the level of funding under the first Fusion Capital agreement was lower than we had anticipated, during 2002 we obtained additional funds through sales of our securities to other parties in the approximate amount of \$875,000.

The majority of these funds were used for operating expenses. We will need further capital, as we continue to expand our business.

Second Fusion Capital Financing Transaction

In March 2003, we entered into another similar common stock purchase agreement with Fusion Capital, pursuant to which Fusion Capital agreed to purchase up to \$10 million of our common stock. The selling price of the shares will be equal to a price based upon the future market price of the common stock without any fixed discount to the market price. Sales under this agreement will not commence until such time as we have completed a registration proceeding with respect thereto. We expect to file a registration statement relating to this transaction in the very near future.

CyberHighway Bankruptcy

In September 2000, an involuntary bankruptcy petition was filed against CyberHighway in the Idaho Federal Bankruptcy Court, styled In Re: CyberHighway, Inc., Case No. 00-02454, by ProPeople Staffing, CTC Telecom, Inc. and Hawkins-Smith. We expect a final order of discharge to be issued in the future. We cannot predict when this final order will be issued.

ATTACHMENT 3

USURF America, Inc. Response to
ARIZONA CORPORATION COMMISSION STAFF'S
THIRD SET OF DATA REQUESTS
DOCKET NOS. T-03889A-03-0152,
T-03889A-02-0796 & T-04125A-02-0796

Respondent to Staff requests: Doug McKinnon, President and CEO, USURF America, Inc.

Staff 3-1 The form 10KSB/A filed with the SEC by USURF America, Inc on May 9, 2003 contains the following statement: "Since the end of 2002, we have acquired a competitive local exchange carrier (CLEC) licensed in the State of Arizona and currently provide local telephone, long-distance and dial-up Internet access to approximately 1,700 customers there. Our monthly revenues associated with these customers is (sic) approximately \$75,000."

a. Identify the Arizona CLEC that USURF America, Inc has purchased.

USURF has not purchased a CLEC in Arizona. The disclosure under Form 10KSB/A, Part I, Item 1. Business: Telephone (Voice) Services: Reads as follows:

"At December 31, 2002, we did not provide telephone service to any customers. However, in February 2003, we acquired the customer base of an Arizona-based competitive local exchange carrier (CLEC)"

The disclosure further reads that:

"We are in the process of obtaining a CLEC license in Arizona. We are aware of no impediment to our becoming a licensed CLEC in Arizona. Until we obtain this license, we have contracted with an Arizona-licensed CLEC, DMJ Communications, Inc., to provide services to our customers on an agency basis."

Additionally, the following disclosure was included in the USURF Form 10QSB:

"In March 2003, we entered into an agreement whereby we agreed to purchase the customer base of an Arizona competitive local exchange carrier (CLEC), subject to the requisite approvals from the Arizona Corporation Commission (ACC) and other regulatory authorities. The purchase price, payable 90 days from the execution date of the agreement, is to be based upon the number of remaining paying customers at the end of the 90 day period. At the execution of the agreement, there were approximately 1,700 customers generating approximately \$100,000 gross revenue per month.

We do not hold a certificate for operating as a CLEC in the State of Arizona and, therefore, have entered into an agency agreement with a CLEC to provide services to these customers, until such time as we have obtained CLEC certification in Arizona.

Currently, it is uncertain whether the ACC will approve the transfer of the acquired customer base; based upon information currently available to our management, it appears unlikely that the transfer of customers will be approved by the ACC. Based upon this uncertainty, for the three months ended March 31, 2003, we did not record any revenue or related expense related to the transaction. We have not made any payments nor have we realized any revenue from the transaction. Ultimately, should the customer transfer not be approved by the ACC prior to the 90-day look-back date for determining the purchase price of the customer base, the effect would be that there are no paying customers and we would, therefore, have no payment obligation with respect to the transaction."

- b. *Provide the date on which the purchase closed.*

The purchase agreement between USURF and The Phone Company Management Group, LLC ("PCMGM") was dated March 3, 2003 with payment to be made ninety days from that date.

- c. *Provide a copy of the purchase agreement between USURF America, Inc. and the CLEC in question.*

A copy of the USURF/PCMGM is attached.

Staff 3-2

On January 29, 2003 USURF America, Inc issued a press release titled "USURF America Completes Acquisition of DMJ Communications." That press release refers only to DMJ's operations in Colorado. USURF America, Inc's response to Staff's data request 1-20 received on April 30, 2003 indicates that DMJ Communications was not purchased because "certain conditions" were not met.

- a. *Explain the apparent discrepancy between the January 29, 2003 press release and USURF America, Inc's response to Staff's data request 1-20.*

The Agreement between USURF and DMJ contains the following language in Section IV. Paragraph C.

"Approvals: Notwithstanding the above, the consummation of the transactions contemplated by the Agreement may be subject to the approval of the Colorado PUC and/or other instrumentalities of the State of Colorado. If such approvals are required, the effective date of this agreement shall be the date of said approvals; however, for accounting and reporting purposes, the transaction shall be the Exchange date."

The agreement calls for the approval of the Colorado PUC and it appears that DMJ may not get the requisite approvals. The following statement was included in the Form 10KSB:

"In January 2003, we acquired DMJ Communications (Colorado), Inc., a small CLEC licensed to operate as such by the State of Colorado. At the time of acquisition, this CLEC provided local telephone service to approximately 100

ATTACHMENT 4

Currently, it is uncertain whether the ACC will approve the transfer of the acquired customer base; based upon information currently available to our management, it appears unlikely that the transfer of customers will be approved by the ACC. Based upon this uncertainty, for the three months ended March 31, 2003, we did not record any revenue or related expense related to the transaction. We have not made any payments nor have we realized any revenue from the transaction. Ultimately, should the customer transfer not be approved by the ACC prior to the 90-day look-back date for determining the purchase price of the customer base, the effect would be that there are no paying customers and we would, therefore, have no payment obligation with respect to the transaction."

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The agreement calls for the approval of the Colorado PUC and it appears that DMJ may not get the requisite approvals. The following statement was included in the Form 10KSB:

"In January 2003, we acquired DMJ Communications (Colorado), Inc., a small CLEC licensed to operate as such by the State of Colorado. At the time of acquisition, this CLEC provided local telephone service to approximately 100

customers. Our application to the Colorado Public Utilities Commission (PUC) for approval of the change in ownership of this CLEC recently has become stalled. Due to deficiencies in the acquired CLEC's administrative filings, we anticipate that approval of our PUC application will not occur in the near term, if at all. Should our PUC application ultimately be denied, we may elect to rescind the acquisition. Due to these circumstances, none of the acquired customer base remains. "

- b. *Did the purchase of DMJ Communications, Inc. by USURF America, Inc include DMJ's Arizona operations?*

The purchase agreement contemplated the purchase of DMJ Communications (Colorado), Inc. a Colorado corporation ("DMJ Colorado"). To the best of my knowledge and belief, DMJ Colorado had no operations in Arizona.

- c. *Provide a copy of the purchase agreement between USURF America, Inc and DMJ Communications, Inc*

A copy of the agreement is attached.

- Staff 3-3 *Explain in detail any and all relationships between USURF America, Inc, USURF Telecom of Arizona Inc., USURF Communications Inc. and Marc David Shiner.*

USURF has no relationship with David Shiner.

- Staff 3-4 *Explain in detail any and all relationships between USURF America, Inc, USURF Telecom of Arizona Inc., USURF Communications Inc. and Leon Swichkow.*

USURF has no relationship with Leon Swichkow.

- Staff 3-5 *Explain in detail any and all relationships between USURF America, Inc, USURF Telecom of Arizona Inc., USURF Communications Inc. and Louis Stinson, Jr. PA.*

USURF has no relationship with Louis Stinson, Jr. P.A.

- Staff 3-6 *On May 15, 2003 the Hearing Division of the Arizona Corporation Commission issued a procedural order which among other things ordered Staff to make a filing regarding USURF that "shall, at a minimum, include a list detailing its past and present partners, members, officers, board members and shareholders..." (Page 8 line 26.5)*

- a. *Provide a list of all past and present partners in USURF America, Inc, USURF Telecom of Arizona, Inc., and USURF Communications Inc. Provide dates when the partners joined and when they left the relevant companies.*

ATTACHMENT 5



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U.S. Securities and Exchange Commission

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
CASE NO. 03-608175

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

MARK DAVID SHINER,
LEON SWICKKOW,
TIMOTHY WETHERALD, and
TELECOM ADVISORY SERVICES, INC.,

Defendants,

and

LOUIS STINSON, JR., P.A., as escrow agent for
certain accounts,
EQUITY SERVICE ADMINISTRATION, INC.,
MARKETING MEDIA, INC., and
USA MEDIA GROUP, INC.

Relief Defendant.

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff, Securities and Exchange Commission ("SEC") alleges:

INTRODUCTION

1. The SEC brings this action to restrain and enjoin Defendants Mark David Shiner ("Shiner"), Leon Swichkow ("Swichkow"), Timothy Wetherald ("Wetherald") and Telecom Advisory Services, Inc. ("Telecom Advisory") from violating and continuing to violate the federal securities laws in connection with their ongoing, fraudulent, unregistered offer and sale of securities. Since at least February 2001 (and possibly earlier) through the present, Shiner, Swichkow, Wetherald and Telecom Advisory (collectively "Defendants") have raised at least \$7.6 million from hundreds of investors by offering and selling unregistered securities in a series of Limited Liability Partnerships ("LLPs"). In each instance, the LLPs were ostensibly formed to operate competitive local telephone exchange carriers ("CLECs") in Western

states where Qwest Communications was the dominant local telephone carrier. The six (6) LLPs were each structured into eighty "units," fifty voting and thirty non-voting, valued at \$19,975.00 per unit. The names of the six LLPs are: (1) Mile High Telecom Partners, LLP ("Mile High"), (2) Phone Company of Arizona, LLP ("Arizona"), (3) Washington Phone Company, LLP ("Washington"), (4) Minnesota Phone Company Financial Group, LLP ("Minnesota"), (5) Iowa-Nebraska Phone Company, LLP ("Iowa-Nebraska"), and (6) Oregon Phone Company Financial Group, LLP ("Oregon"). They were to be partnered with On Systems Technology, LLC ("On Systems"), a company represented by the Defendants as having the technical expertise to manage local telephone company operations.

2. Defendants used salesmen at Defendant Telecom Advisory, an unregistered broker-dealer, to market the LLPs and to make numerous material misrepresentations and omissions, including (1) providing unrealistic and baseless projections for rates of return and potential buyout offers, (2) failing to disclose that the majority of the invested funds were used to pay exorbitant commissions and "management fees" to entities controlled by the Defendants, including the Relief Defendants herein, (3) failing to disclose the interlocking relationships of the entities and individuals involved, (4) failing to disclose that certain of the "non-voting" units would be sold before the voting units had recouped their original investment from the profits of the telephone company, (5) failing to disclose the negative regulatory histories of Defendants Shiner, Swickow and Wetherald, and (6) failing to disclose that neither Mile High Telecom, nor any of the other phone companies they established, were properly licensed to operate in the respective states they purported to serve.

3. At present, only one of the LLPs, Mile High, has any operating history, and its operations are unsuccessful, with the likelihood that the investors will not only lose all of their investment, but may also inherit the liabilities of Mile High LLP, which holds a 70% interest in an entity known as Mile High Telecom Joint Venture, which was put into Chapter 11 bankruptcy in the District of Colorado on January 14, 2003. Unless immediately restrained and enjoined, Defendants will continue to defraud the investing public and place investor funds in serious risk of diversion and theft.

DEFENDANTS

4. Defendant Marc David Shiner ("Shiner"), age 58, is a resident of Boca Raton, Florida. He is the Secretary of Defendant Telecom Advisory, as well as Relief Defendants Equity Service and USA Media. On information and belief, he had an ownership interest in On Systems, and performed his consulting work to the LLPs through Relief Defendant Marketing Media, Inc. In 1986, the SEC barred Shiner from association with a broker or dealer, investment company, investment adviser or municipal securities dealer for five years for his failure to disclose a 1984 conviction in Massachusetts for insurance fraud, larceny and attempted larceny (*In the Matter of Marc D. Shiner, Barry L. King, Wellesley Financial Management Services, Inc.*, Admin. Proc. File. 3-6759, Rel. No. 34-23862 (Dec. 3, 1986)). Shiner has not reapplied to become associated with a broker or dealer. In 1998, while involved in promoting electric power partnerships in a similar scheme to this one, Shiner was convicted of federal tax evasion, and served four months in prison and four months of house arrest. In March of 2002, the SEC sued Shiner in the Southern District of Florida, alleging that he

defrauded investors in the offer and sale of those electric power partnerships. (*SEC v. Grabarnick, et al, Case No.02-CV-20875(JAL)*).

5. Defendant Leon Swichkow ("Swichkow"), age 58, is a resident of Fort Lauderdale, Florida. He is President of Defendant Telecom Advisory, as well as Relief Defendants Equity Service and USA Media. On information and belief, he had an ownership interest in On Systems. In 1995, Swichkow paid a \$10,000 civil penalty in settlement of allegations that he violated the Federal Trade Commission ("FTC")'s Franchise Rule by failing to supply potential investors both pre-sale disclosures concerning a business opportunities he was selling as well as supporting documentation for claimed earnings. Swichkow is prohibited by the settlement from violating the Franchise Rule and from making any false statements or misrepresenting material aspects of any business venture he offers. (*United States v. America's Radio Transmitter, Ltd. Case No. 95-8428-CIV-King (S.D.Fla., July 10, 1995)*).

6. Defendant Timothy Wetherald ("Wetherald"), age 43, is a resident of Denver, Colorado. He is the president, part owner, and controls On Systems. Wetherald was enjoined from engaging in trade or commerce related to the provision of telecommunications services by the Attorney General of Oregon in 1991. He was also sued for a similar injunction by the State of Washington in 1994, and entered into a consent decree. (*State of Washington v. GTI Telecommunications, Inc. et al, case No. 94-2-21036-0*).

7. Defendant Telecom Advisory Services, Inc ("Telecom Advisory") is a Florida corporation owned and operated by Defendants Shiner and Swichkow in Boca Raton, Florida. Defendant Telecom Advisory is not registered as a broker-dealer with the SEC, yet its salesmen marketed the sale of "units" in the six LLPs that are the subject of this action.

RELIEF DEFENDANTS

8. Relief Defendant Louis Stinson, Jr., P.A. ("Stinson law firm") is the law firm of Louis Stinson, Jr., an attorney who has incorporated several entities controlled by Defendants Shiner and Swichkow and acts as their registered agent. The Stinson law firm is located at 4675 Ponce De Leon Blvd., Suite 305, Coral Gables, FL. Escrow accounts are maintained by the Stinson law firm at Regent Bank, 2205 S. University Drive, Davie, Florida in the names of the six LLPs as follows:

<u>LLP</u>	<u>Account Number</u>
"Mile High"	202855706
"Arizona"	203071306
"Washington"	3200306406
"Minnesota"	3200324206
"Iowa/Nebraska"	3200389706
"Oregon"	3200329306

Each of the Stinson law firm escrow accounts received deposits from

investors in the LLP units marketed by Defendant Telecom Advisory.

9. Relief Defendant Equity Service Administration, Inc. ("Equity Service") is a Florida corporation owned and operated by Defendants Shiner and Swichkow in Boca Raton, Florida, at the same address as Defendant Telecom Advisory. Equity Service was paid a flat fee for each telephone partnership "unit" purchased through Defendant Telecom Advisory for "administration." These fees were deposited into Account Number 3882878778 at Washington Mutual Bank, 1100 E. Hillsboro Boulevard, Deerfield Beach, Florida, and Account Number 3200300506 at Regent Bank, in an amount totaling approximately \$273,104.

10. Relief Defendant Marketing Media, Inc. ("Marketing") is a Florida corporation located at Defendant Shiner's home address in Boca Raton, Florida. Defendant Shiner uses Marketing to perform his consulting work for the LLPs marketed by Telecom Advisory, and Marketing has received approximately \$425,500 from Telecom Advisory in 2002. These fees were deposited into Account Number 1790222178 at Washington Mutual Bank.

11. Relief Defendant USA Media Group, Inc. ("USA") is a Florida corporation owned and operated by Defendants Shiner and Swichkow in Coral Gables, Florida, at the same address as the Stinson law firm. USA has received approximately \$207,885 from Telecom Advisory in 2002, which was deposited into Account Number 3200301306 at Regent Bank.

OTHER RELEVANT INDIVIDUALS AND ENTITIES

12. On Systems Technology, LLC ("On Systems") is a Colorado limited liability company formed on October 20, 2000 by Defendant Wetherald to provide local exchange and other telecommunications services in the State of Colorado. Defendant Wetherald owns 35% of On Systems. On information and belief, two trusts have been established for Defendants Shiner and Swichkow to hold their combined 35% ownership interest.

13. John A. Kasbar & Co., Inc. ("Kasbar & Co.") is a Florida corporation in Hollywood, Florida owned and operated by John A. Kasbar ("Kasbar"). Kasbar and Co. provided accounting services to the Stinson law firm for the escrow accounts established for the LLPs.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d) and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d) and 77v(a), and Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(d), 78u(e) and 78aa.

15. This Court has personal jurisdiction over the Defendants and venue is proper in the Southern District of Florida because many of the Defendants' acts and transactions constituting violations of the Securities Act and the Exchange Act occurred in the Southern District of Florida. In addition, the principal offices of Defendant Telecom Advisory Services, Inc. are located in the Southern District of Florida, and Defendants Shiner and Swichkow reside in the Southern District of Florida. Relief Defendants Louis Stinson

Jr., P.A., Equity Service Administration, Inc., Marketing Media, Inc. and USA Media Group, Inc also have their principal offices in the Southern District of Florida.

16. Defendants, directly and indirectly, have made use of the means and instrumentalities of interstate commerce, the means and instruments of transportation and communication in interstate commerce, and the mails, in connection with the acts, practices, and courses of business set forth in this Complaint.

THE FRAUDULENT SCHEME

1. The Unregistered Offerings Mile High

17. Investors were offered "units" in Mile High Telecom Partners, LLP (the "Mile High Partnership"), which was represented by the defendants and their agents to be a Colorado limited liability partnership established to own and operate a "competitive local exchange carrier (CLEC)," named Mile High Telecom, that would provide local telephone services in Colorado, an area already serviced by Qwest Communications ("Qwest"). Investors were told that Mile High Telecom would be managed by On Systems Technology, LLC ("On Systems"), a telecommunications company located in Denver, Colorado, and that On Systems had secured the proper licenses to operate a local phone company. They were also told that the head of On Systems, Defendant Wetherald, was experienced in the management of telephone companies.

18. Prospective investors were solicited by facsimile, inviting them to serve on an advisory board for a start up telephone company and receive potential income in excess of \$100,000. When investors called the contact telephone number from the facsimile they were connected to a salesman at Telecom Advisory who described what turned out to be an investment opportunity. The salesman described how the Mile High Partnership would be made up of a total of fifty (50) voting units, and thirty (30) non-voting units, to be retained by an "initial managing partner." The salesmen gave varying accounts as to how the \$19,975 per unit would be allocated, but none of them ever disclosed to the investors that Telecom Advisory would receive a 40% commission. Investors were told that they would recoup their investment somewhere between 9 and 24 months, depending on the salesman, followed by substantial monthly checks, until the company was sold for a significant profit. The salesmen also offered widely varying estimates of the potential buyout value for each unit, ranging from \$175,000 up to \$3,750,000 per unit. The salesmen also told the investors that the non-voting units (held by the initial managing partner) would not be offered for sale or share in the profits until all of the owners of the voting units received profit distributions equal to the amount of their initial investment. To close the deal, Telecom Advisory salesmen often used "boiler room" tactics, such as telling investors that the units were almost sold out, and they needed to buy immediately in order not to miss the opportunity. One salesman told an investor that an investment in the Mile High Partnership was "like having a license to steal."

19. Investors were provided with additional documentation concerning the investment, in some cases after they had already sent their purchase money to Telecom Advisory. These materials included offering materials

with profit projections, a Mile High Telecom Partners, LLP Partnership Agreement, a rollover IRA Application for Entrust Administration ("Entrust") (located in Oakland, California), and a Mile High Telecom Partners, LLP Application, including Subscription Documents and a Subscription Application and Agreement. Shiner prepared the offering materials with assistance from Wetherald as to profit and buyout projections. The offering materials stated that the LLPs had not been registered under the federal securities laws or the laws of any state. Shiner included the IRA Application in order to tap into investors' retirement accounts, a tactic which worked on dozens of occasions. In those instances, the investor would establish an self-directed IRA at Entrust and roll their retirement money into it. The IRA ploy allowed Telecom Advisory's salesmen to ensnare some investors of modest means who otherwise never would have been able to afford to send \$19,975 into this scheme. Based on the representations made by the Telecom Advisory salesmen, including the representation that they needed to invest quickly, many investors completed the paperwork after only a cursory review.

20. Despite language in the partnership agreement, the investors did not have meaningful managerial control over the Mile High Partnership, and were, in substance, passive investors. Many of the investors lacked the technical expertise or business savvy required to manage any sort of company, let alone a start up in a highly regulated industry. The Telecom Advisory salesmen told the investors that this was not important, since On Systems and Defendant Wetherald had the expertise. This was true of investors who became "managing partners" as well. Most did not even live in Colorado, where the business was supposed to be located. They continued to operate their own businesses and merely received updates outlining the purported success of Mile High Telecom by e-mail, telephone and facsimile. They did nothing to contribute to the success or failure of the partnerships, and expected profits to be derived from the entrepreneurial or managerial efforts of others. Furthermore, as described more fully below, defendants gutted the Mile High Partnership, leaving the investors with insufficient funding to create or run a successful business.

21. Once investors had acquired a unit in the Mile High Partnership, they were often induced to invest in additional units or portions thereof. Investors were also induced to purchase identical units in other LLPs that were being set up to operate phone companies in other states in a virtually identical fashion to Mile High Telecom. Investors were repeatedly told that On Systems, and Defendant Wetherald had extensive expertise in operating telecommunications companies, and that Mile High Telecom's customer base was growing substantially due to On System's and Wetherald's successful management.

22. Monies received from investors were deposited into an escrow account held by Relief Defendant Louis Stinson Jr., P.A. for the Mile High Partnership. Investors sent money to the Stinson escrow account in one of three ways: 1) checks mailed to Telecom Advisory, 2) direct wire transfers to Regent Bank, or 3) payments (including wire transfers) directed through Entrust, the California-based IRA custodian. Approximately 45% of these funds were disbursed to the Defendants and Relief Defendants in the form of "administration of escrow," "commissions," "marketing costs," "partnership administration," and "design, printing, shipping, etc." payments. None of these payments went towards the operation of the

underlying business, the local phone company. For example, from each \$19,975 invested by the voting unit partners, Telecom Advisory typically received \$8,000, Equity Service received \$850, Stinson and Kasbar received a combined \$125, and On Systems received \$8,000, leaving only \$3,000 in the operating escrow for the partnership itself, thus ensuring its ultimate failure. This distribution was even more skewed for the non-voting units. For each \$19,975 invested for a non-voting unit, Telecom Advisory typically received \$16,000, Equity Service received \$850, Stinson and Kasbar received a combined \$125, leaving only \$3,000 in the operating escrow for the partnership itself. On Systems, the only entity even purporting to operate the local phone company received no proceeds from a non-voting unit.

**Arizona, Washington, Minnesota,
Iowa-Nebraska and Oregon**

23. Similar representations were made by the salesmen at Telecom Advisory to sell "units" in the other LLPs, in connection with the provision of telephone services in Arizona, Washington, Minnesota, Iowa and Nebraska, and Oregon. In addition, with Mile High Telecom already operating at the time these other LLPs were marketed, the salesmen routinely touted the purported success of Mile High Telecom as reason to purchase units in the other LLPs. Further, like Mile High Telecom, those phone companies that were actually established by Wetherald in these later states were never properly licensed to operate. The salesmen routinely misrepresented to investors the fact that Wetherald failed to secure the proper licenses in these states.

24. Monies received from investors were deposited into separate escrow accounts held by Relief Defendant Louis Stinson Jr., P.A. in the names of the Arizona, Washington, Minnesota, Iowa-Nebraska, and Oregon Partnerships. As with the Mile High Partnership, approximately half or more of these funds were disbursed to the Defendants and Relief Defendants in some form of commissions and "management fees," none of which went towards the operation of the underlying businesses, the local phone companies.

2. Material Misrepresentations and Omissions in the Offer or Sale of Securities and in Connection With the Purchase or Sale of Securities

25. In making their sales pitch concerning Mile High (and the other phone company partnerships), the salesmen at Telecom Advisory made a number of materially misleading statements and omissions. For example, investors were promised that their initial capital contribution would be returned within two years or less, with significant profits thereafter. When offering materials were sent to potential investors by Telecom Advisory, they also included unrealistic and baseless projections for rates of return and potential buyout offers, such as the claim that a buyout would yield between \$175,000 and \$525,000 per unit.

26. Investors were never told that the majority of the invested funds were used to pay exorbitant commissions and "management fees" to entities controlled by the Defendants, including the Relief Defendants herein, which is exactly what happened to their money. Instead, they were told either that approximately 10% -15% of the investment would go towards

commissions, or the matter was never discussed.

27. Investors were never told of the interlocking relationships of the entities and individuals involved in the promotion of Mile High, nor were they told that each of the Defendants Shiner, Swickow and Wetherald had negative regulatory histories. In fact, Defendants Shiner and Swickow not only controlled Telecom Advisory, Equity Service, and USA Media, but upon information and belief, also had an ownership interest in On Systems. Shiner was barred from associating with a broker-dealer by the SEC. He was convicted of federal tax evasion and was on federal probation during the marketing of several of the LLPs. He was also sued in March 2002 by the SEC in connection with a similar scheme that promoted electric power company partnerships. Swickow paid a \$10,000 penalty and is prohibited from making false statements or misrepresenting the material aspects of any business venture he offers in connection with his violations of the Federal Trade Commission ("FTC")'s Franchise Rule. Investors were never made aware of these facts, nor were they told that Defendant Wetherald, touted as having experience in the telecommunications business, had a prior injunction in Oregon and had entered into a consent decree in Washington State that prevented him from engaging in the telecommunications business, two states where subsequent LLPs were to operate.

28. Investors were told that the thirty (30) non-voting units in the Mile High Partnership would be retained by the initial managing partner, or be converted to a voting unit for \$3000 (and held by the promoters) until the investors in the voting units had recouped their initial investment from the profits of the operation of the phone company. In fact, a number of the non-voting units were sold the same day the last voting unit was sold, with defendant Telecom Advisory receiving twice the already exorbitant commission received for the sale of the voting units. Further, some investors were sold non-voting units after being specifically told that they were buying voting units. In those instances, Telecom still sent the investors voting unit certificates, with no indication that they had purchased what was originally a non-voting unit.

29. The investors were told that Mile High Telecom was properly licensed to operate as a CLEC in the State of Colorado when the Mile High Partnership was formed. In fact, Mile High Telecom was never properly licensed to operate a telephone company in Colorado. Wetherald hid this problem from the investors for months, even after the Colorado Public Utility Commission ("CPUC") issued an Order to Show Cause against Mile High Telecom. He further misled the investors when the problem surfaced by claiming that there was merely a misunderstanding as to which entity should hold the license. Contrary to claims in the offering materials, the phone companies that were established for the Arizona, Washington, Minnesota, Iowa-Nebraska and Oregon LLPs were not properly licensed either.

30. Investors in the LLPs for Arizona, Washington, Minnesota, Iowa-Nebraska and Oregon were told that Mile High Telecom was profitable and would soon be returning the partners their initial investments, when in fact Mile High Telecom was in trouble financially and never returned any investor's initial investment. In fact, although Wetherald managed to obtain approximately 13,000 subscribers for Mile High's Services, he not only failed to return money to the investors, according to Qwest, he also

accumulated approximately a \$4 million debt for leasing the telephone lines, which has never been repaid.

31. Each of these misrepresentations and omissions is a material fact that investors should have been told before they were induced to part with their money. Had the investors known the truth concerning any of these representations or omissions, they would have not invested in the LLPs.

3. Acting as an Unregistered Broker-Dealer

32. Defendant Telecom Advisory, while engaged in the above-described offer and sale of securities had not registered with the Securities and Exchange Commission, as required by Section 15 of the Exchange Act, 15 U.S.C. 78. Telecom Advisory fits within none of the exemptions from registration. Defendants Shiner and Swichkow, while engaged in the above-described offer and sale of securities, were not associated with a properly registered broker-dealer.

33. Defendant Shiner was previously barred by the SEC from associating with a broker dealer for five years, and has never reapplied to the SEC in order to do so.

COUNT ONE

OFFER AND SALE OF UNREGISTERED SECURITIES IN VIOLATION OF SECTIONS 5(a) AND 5(c) OF THE SECURITIES ACT (Defendants Shiner, Swichkow and Telecom Advisory)

34. The Commission repeats and realleges Paragraphs 1 through 33 of this Complaint as if fully set forth herein.

35. No registration statement was filed or in effect with the Commission pursuant to the Securities Act and no exemption from registration exists with respect to the securities and transactions described in this Complaint.

36. Since at least February 2001 (and possibly earlier) through the present, Defendants Mark Shiner, Leon Swichkow and Telecom Advisory Services, Inc., directly and indirectly, have been: (i) making use of the means or instruments of transportation or communication in interstate commerce or of the mails to sell securities, through the use or medium of a prospectus or otherwise; and/or (ii) making use of the means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise, without a registration statement having been filed or being in effect with the SEC as to such securities.

37. By reason of the foregoing, Defendants Mark Shiner, Leon Swichkow and Telecom Advisory Services, Inc, directly and indirectly, have violated and, and unless enjoined, will continue to violate Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c).

COUNT II

FRAUD IN VIOLATION OF

SECTION 17(a) OF THE SECURITIES ACT
(Defendants Shiner, Swickow, Wetherald and Telecom Advisory)

38. The Commission repeats and realleges Paragraphs 1 through 37 of this Complaint as if fully set forth herein.

39. Since at least February 2001 (and possibly earlier) through the present, Defendants Mark Shiner, Leon Swickow, Timothy Wetherald and Telecom Advisory Services, Inc., directly and indirectly, by use of the means or instruments of transportation or communication in interstate commerce and by use of the mails, in the offer or sale of securities, have been knowingly, willfully or recklessly employing devices, schemes or artifices to defraud.

40. By reason of the foregoing, Defendants Mark Shiner, Leon Swickow, Timothy Wetherald and Telecom Advisory Services, Inc., directly and indirectly, have violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act, 15 U.S.C. § 77q(a)(1).

COUNT III

FRAUD IN VIOLATION OF SECTION 10(b)
OF THE EXCHANGE ACT AND RULE 10b-5 THEREUNDER
(Defendants Shiner, Swickow, Wetherald and Telecom Advisory)

41. The Commission repeats and realleges Paragraphs 1 through 40 of this Complaint as if fully set forth herein.

42. Since at least February 2001 (and possibly earlier) through the present, Defendants Mark Shiner, Leon Swickow, Timothy Wetherald and Telecom Advisory Services, Inc., directly and indirectly, by use of the means and instrumentality of interstate commerce, and of the mails in connection with the purchase or sale of securities, have been knowingly, willfully or recklessly: (a) employing devices, schemes or artifices to defraud; (b) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and/or (c) engaging in acts, practices and courses of business which have operated, are now operating and will operate as a fraud upon the purchasers of such securities.

43. By reason of the foregoing, Defendants Mark Shiner, Leon Swickow, Timothy Wetherald and Telecom Advisory Services, Inc., directly or indirectly, have violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5.

COUNT IV

FRAUD IN VIOLATION
OF SECTION 15(c) OF THE EXCHANGE ACT
(Defendants Shiner, Swickow and Telecom Advisory)

44. The Commission repeats and realleges Paragraphs 1 through 43 of this Complaint as if fully set forth herein.

45. Since at least February 2001 (and possibly earlier) through the present, Defendants Mark Shiner, Leon Swichkow, Timothy Wetherald and Telecom Advisory Services, Inc., directly and indirectly, by use of the means and instrumentality of interstate commerce, have effected transactions in, or attempting to induce the purchase or sale of, securities while employing manipulative, deceptive, or other fraudulent devices or contrivances.

46. By reason of the foregoing, Defendants Mark Shiner, Leon Swichkow, and Telecom Advisory Services, Inc., directly or indirectly, have violated and, unless enjoined, will continue to violate Section 15(c) of the Exchange Act, 15 U.S.C. § 78o(c).

COUNT V

ACTING AS UNREGISTERED BROKER DEALER IN VIOLATION OF SECTION 15(a) OF THE EXCHANGE ACT (Defendants Shiner, Swichkow and Telecom Advisory)

47. The Commission repeats and realleges Paragraphs 1 through 46 of this Complaint as if fully set forth herein.

48. Since at least February 2001 (and possibly earlier) through the present, Defendants Mark Shiner, Leon Swichkow and Telecom Advisory Services, Inc., made use of the means and instrumentalities of interstate commerce and the mails to effect, induce and attempt to induce the purchase and sale of securities without being registered with the SEC as a broker or dealer, and when no exemption from registration was available.

49. By reason of the foregoing, Defendants Mark Shiner, Leon Swichkow, and Telecom Advisory Services, Inc., directly or indirectly, have violated and, unless enjoined, will continue to violate Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

RELIEF REQUESTED

WHEREFORE, the SEC respectfully requests that the Court:

I. Declaratory Relief

Declare, determine and find that Defendants committed the violations of the federal securities laws alleged in this Complaint.

II. Temporary Restraining Order, Preliminary and Permanent Injunctive Relief

Issue a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction, restraining and enjoining all Defendants, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, and each of them, from violating: (i) Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and (ii) Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder; and enjoining Defendants Shiner, Swichkow and Telecom Advisory, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, and each of

them, from violating: (i) Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c) and (ii) Sections 15(a) and 15(c) of the Exchange Act, 15 U.S.C. §§ 78o(a), 78o(c).

III. Disgorgement

Issue an Order requiring Defendants and Relief Defendants to disgorge all ill-gotten profits or proceeds that they have received as a result of the acts and/or courses of conduct complained of herein, with prejudgment interest.

IV. Penalties

Issue an Order directing Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21 (d) of the Exchange Act, 15 U.S.C. § 78u(d).

V. Asset Freeze and Accountings

Issue an Order freezing the assets of Defendants, and Relief Defendants, until further Order of the Court, and requiring from each of the Defendants and Relief Defendants a document sworn to before a notary public setting forth all assets (whether real or personal) and accounts (including, but not limited to, bank accounts, savings accounts, securities or brokerage accounts, and deposits of any kind) in which they (whether solely or jointly), directly or indirectly (including through a corporation, trust or partnership), either have an interest or over which they have the power, or right to exercise control.

VI. Records Preservation and Expedited Discovery

Issue an Order requiring Defendants and Relief Defendants to preserve any records related to the subject matter of this lawsuit that are in their custody, possession or subject to their control, and to respond to discovery on an expedited basis.

VII. Further Relief

Grant such other and further relief as may be necessary and appropriate.

VIII. Retention of Jurisdiction

Further, the Commission respectfully requests that the Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that may hereby be entered, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

Respectfully submitted,

February 7, 2003 By: _____
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Modified: 02/11/2003

ATTACHMENT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-60175-CIV-ZLOCH

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

PRELIMINARY INJUNCTION

MARC DAVID SHINER, LEON
SWITCHKOW, TIMOTHY WETHERALD,
and TELECOM ADVISORY SERVICES,
INC.,

Defendants,

and

LEWIS STINSON, JR., P.A., as
escrow agent for certain
accounts, EQUITY SERVICE
ADMINISTRATION, INC., MARKETING
MEDIA, INC., and USA MEDIA
GROUP, INC.,

Relief Defendants.

THIS MATTER is before the Court upon Plaintiff, the Securities and Exchange Commission's Motion For Preliminary Injunction (DE 14).¹ The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises. An evidentiary hearing on Plaintiff's Motion For Preliminary Injunction was held before the Court on March 24 and 25, 2003.

I. Background

Plaintiff, the Securities and Exchange Commission (hereinafter the "SEC") commenced the above-styled cause by filing a Complaint For Injunctive and Other

¹ By prior Order (DE 21) the Court construed Plaintiff's request For Order To Show Cause Why A Preliminary Injunction Should Not Be Granted as a Motion For Preliminary Injunction.

Relief (DE 1) alleging violations of various federal securities laws by Defendants Marc David Shiner, Leon Swichkow, Timothy Wetherald, and Telecom Advisory Services, Inc. Specifically, the SEC alleges that Defendants have violated Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), 77e(c), and 77q(a) and Sections 10(b), 15(a), and 15(c) of the Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78o(a), and 78c(c).

On February 10, 2003, the Court held an ex parte hearing on the SEC's Ex Parte Motion For Temporary Restraining Order And Other Emergency relief (DE 14) and entered a Temporary Restraining Order (DE 21). In its Temporary Restraining Order (DE 21) the Court set an evidentiary hearing on Plaintiff's Motion For Preliminary Injunction for February 21, 2003. All Defendants were served original process and received notice of the evidentiary hearing. At the evidentiary hearing the SEC and Defendants Marc David Shiner, Leon Swichkow, Timothy A. Wetherald, and Telecom Advisory Services, Inc., and Relief Defendants Equity Administration, Inc., Marketing Media, Inc., and USA Media Group, Inc. were all represented by counsel and the SEC and the above-named Defendants and Relief Defendants consented to the entry of a Preliminary Injunction And Order Granting Further Relief (DE 41) pending a Final Judgment by the Court.

On March 11, 2003, the SEC filed an Emergency Motion For Continuance (DE 55) to continue trial in this matter which had been set for March 17, 2003. By prior Order (DE 65) the Court continued trial in this matter until June 9, 2003. The Court also set a second evidentiary hearing on the SEC's Motion

For Preliminary Injunction because Defendants argued that they had not consented to the Preliminary Injunction (DE 41) remaining in effect passed the original trial date of March 17, 2003. Accordingly, the Court held an evidentiary hearing on March 24 and 25, 2003, and now enters the following findings of fact and conclusions of law:

II. Findings of Fact

1. In approximately February, 2001, Defendants, Marc David Shiner ("Shiner"), Leon Swichkow ("Swichkow"), Timothy Wetherald ("Wetherald") and Telecom Advisory Services, Inc. ("Telecom Advisory") began offering investors the opportunity to buy "units" in six Limited Liability Partnerships ("LLPs") which were formed ostensibly to operate competitive local telephone exchange carriers in Western states where Qwest Communications was the dominant local telephone carrier.

2. Ownership of each of the six LLPs was structured into eighty (80) units, fifty (50) voting and thirty (30) non-voting, which sold for \$19,975.00 per unit. The names of the six LLPs are: (1) Mile High Telecom Partners, LLP ("Mile High"); (2) Phone Company of Arizona, LLP ("Arizona"); (3) Washington Phone Company, LLP ("Washington"); (4) Minnesota Phone Company Financial Group, LLP ("Minnesota"); (5) Iowa-Nebraska Phone Company, LLP ("Iowa-Nebraska"); and (6) Oregon Phone Company Financial Group, LLP ("Oregon").

3. Defendants raised approximately 7.6 million dollars from the sale of units in the six LLPs.

4. Defendant Wetherald is the manager and part-owner of On Systems Technology, LLC, a Colorado limited liability company formed by Wetherald to provide local exchange and other telecommunications services in the State of Colorado. On Systems Technology, LLC was appointed to manage the local telephone companies on behalf of the LLPs, and On Systems Technology, LLC was the original telephone company manager for each of the six LLPs. On Systems Technology, LLC is not a defendant in this lawsuit.

5. Relief Defendants Marketing Media, Inc. ("Marketing Media"), USA Media Group, Inc. ("USA"), and Equity Service Administration, Inc. ("Equity") are all entities owned and/or operated by Defendants Shiner and Swichkow. Marketing Media, USA, and Equity all received compensation for work done in connection with the LLPs.

6. Relief Defendants, Louis Stinson, Jr., P.A., acted as the escrow agent for the funds collected from investors for each of the six LLPs.

7. Thomas M. Birdwell, Jr., George E. Lindamood, Ronald C. Slechta, Edward Ragone, and Bernard Baake each invested in at least one of the LLPs, and each provided a declaration and/or were deposed in this matter. The Court shall refer to these individuals collectively as "Declarants" or "Deponents."

8. Each prospective investor was initially solicited by facsimile to become a member on an advisory board for a start up telephone company. When the prospective investor contacted the telephone number provided on the facsimile he or she was connected to a salesperson at Defendant Telecom Advisory and a conversation would ensue regarding investing in the LLPS and not regarding participation on an advisory board. The salesperson would then send the prospective investor documentation including a Partnership Agreement, Subscription Documents, and Offering Materials.

9. The Partnership Agreements stated that investing in the LLPS was not a passive investment and contained the following language:

7.2 Management. Participation in this Partnership is not a passive involvement. It is managed by the Partners themselves. Each Partner is required to actively participate in important business decision affecting the Partnership by exercising his/its voting privileges. Each Partner has the right and agrees to participate in one or more committees which shall oversee and conduct important business. These committees may include the following: Accounting and Audit, Advertising and Public Relations, Business Standards, Insurance Coverage, Legal Oversight, Partnership Communications/Newsletters, Planning, Budget and Finance, Sales and Marketing.

10. The Subscription Documents required each prospective investor to answer questions regarding their general business knowledge. Investors also affirmed that they had understood the Partnership Agreement and Subscription Documents and that they had not relied upon any oral or written representations or warranties in investing in the LLPS.

11. The Subscription Documents required each prospective investor to ratify, approve and accept all acts undertaken by On Systems Technology, LLC, the telephone company manager, in connection with the planning, preparation, and creation of the LLPs, and to agree to be bound by any existing contracts entered into by the Initial Managing Partner(s). The Initial Managing Partner(s) for each of the six LLPs were: (1) Mile High - Z. Helfer; (2) Arizona – Paul Meyer and Defendant Swichkow; (3) Washington - George E. Lindamood and Defendant Swichkow; (4) Minnesota - Steven Petersen and Defendant Swichkow; (5) Iowa-Nebraska – Ronald C. Slechta and Defendant Swichkow; and (6) Oregon – Ed Ragone and Defendant Swichkow.

12. The Offering Materials contained a Disclosure of Risk statement which advised prospective investors that the interests being sold were not securities and were not protected under federal securities laws.

13. The Offering Materials touted Defendant Wetherald as being a veteran of fifteen (15) years experience in the telecommunications industry and stated that On Systems Technology, LLC would be responsible for the day-to-day operations of the local telephone companies.

14. The Partnership Agreement advised prospective investors that the proceeds from the sale of the fifty (50) voting units in each LLP would be expended as follows: (1) 5% for administration of escrow compliance, legal and accounting; (2) 15% for commissions; (3) 14% for marketing; (4) 4% for partnership administration; (5) 7% for design, printing, shipping, etc.; (6) 15% for

operating reserves; (7) 30% for telephone company marketing and customer acquisition; and (8) 10% for telephone company equipment.

15. Prospective investors were not advised that Defendants Shiner and Swichkow owned and/or controlled the entities (i.e., relief Defendants Equity, Marketing Media, and USA) that would receive commissions and compensation for various services rendered to the LLPs such as administration, marketing, and advertising.

16. Prospective investors were not told of the negative regulatory histories of Defendants Swichkow, Shiner, and Wetherald. For example, investors were not told that Defendant Shiner, inter alia, had a previous conviction for federal tax evasion, that Defendant Swichkow paid a civil penalty in settlement of allegations that he violated the Federal Trade Commission's Franchise Rule, and that Defendant Wetherald, inter alia, entered into a Consent Decree with the State of Washington enjoining him from becoming employed and/or entering into a participation agreement with any such individual or entity selling interstate or intrastate long distance telecommunications services without first providing any such individual or entity a copy of the Consent Decree and Complaint filed against Defendant Wetherald.

17. Declarants stated that had they been provided the information contained in paragraphs 15 and 16, they would not have invested in the LLPs. Declarants further stated that they have not received any return on their investments.

18. Although the Partnership Agreements stated that investors could not be passive and must take an active part in managing the LLPs, Declarants stated that they were unable to get any information concerning who the other investors in the various LLPs were, and that they were effectively precluded from becoming involved in running the LLPs due to Defendants' unavailability and failure to share information.

19. Declarants further stated that by the time they were able to organize regular communications amongst investors there were effectively no telephone companies left to run because the state of affairs surrounding the telephone companies had disintegrated and the money raised from investors had been distributed to the various entities owned and/or controlled by Defendants Shiner, Swichkow, and Wetherald.

20. One of the LLPs, Mile High, is currently in bankruptcy proceedings.

21. Declarants further stated that they were repeatedly told that Defendant Wetherald was experienced in the telecommunications industry and that he would run the telephone companies on behalf of the LLPs.

22. Some investors did become Managing Partners and once organized were able to remove On Systems Technology, LLC as the management company for their telephone companies. For example, On Systems Technology,

LLC is no longer the management company for the Iowa-Nebraska, Oregon, Washington, and Minnesota LLPs.

III. Conclusions of Law

23. This Court has jurisdiction over the above-styled cause pursuant to 15 U.S.C. §§ 77t(b), 77t(d), 77v(a), 78u(d), 78u(e), and 78aa. Venue is proper in the Southern District of Florida because a substantial part of the events that gave rise to the claims occurred in this District. 28 U.S.C. § 1391; 15 U.S.C. § 78aa.

24. The federal securities laws are to be interpreted broadly and liberally in order to effectuate Congress' intent to protect investors and to reach the various schemes devised by those persons who would use the money of others on the promise of profits. See S.E.C. v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982); Stowell v. Ted S. Finkel Inv. Servs., 489 F. Supp. 1209, 1219 (S.D. Fla. 1980).

25. Under federal securities laws the SEC is entitled to a preliminary injunction if it establishes: (1) a prima facie case of previous violations of federal securities laws; and (2) a reasonable likelihood that the wrong will be repeated. S.E.C. v. Unique Fin. Concepts, Inc., 196 F.3d 1295, 1199 n.2 (11th Cir. 1999). Notably, there is no requirement that the SEC demonstrate irreparable harm because when the Government seeks injunctive relief "the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in [such] cases." S.E.C. v. J.W. Korth & Co., 991 F. Supp. 1468, 1472-73 (S.D. Fla. 1998).

26. The first issue for the Court to resolve is whether Defendants are selling securities or merely units in general partnerships. The term “security” under federal securities laws includes an “investment contract.” 15 U.S.C. § 77b(a)(1). An investment contract “is ‘a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party . . .’” Unique Fin. Concepts, Inc., 196 F.3d at 1199 (quoting SEC v. W.J. Howey Co., 328 U.S. 293 (1946)).

27. The Eleventh Circuit has divided the Howey test into three elements: (1) an investment of money; (2) a common enterprise; and (3) the expectation of profits to be derived solely from the efforts of others. Id.²

28. Economic substance, not form, determines whether or not the units at issue here are securities. Williamson v. Tucker, 645 F.2d 404, 418 (5th Cir. 1981).

29. The parties do not dispute whether there was an investment of money in a common enterprise. Rather, the parties vigorously dispute whether the investors expected profits to be derived solely from the efforts of Defendants.

30. The general rule is that units in general partnerships are not investment contracts and therefore not securities under federal law. Friendly Power Co. LLC, 49 F. Supp. 2d at 1369. There are, however, exceptions to the general rule. If, for example, the investors have an agreement that leaves them so

² Because this Court sits in the Southern District of Florida and the above-styled cause raises a question of federal law, this Court follows and applies Eleventh Circuit and Southern District of Florida case law. See Meeks v. Ill. Cent. Gulf R.R., 738 F.2d 748, 751 (6th Cir. 1984); see also S.E.C. v. Friendly Power Co. LLC, 49 F. Supp. 2d 1363 (S.D. Fla. 1999) (following Eleventh Circuit precedent in securities fraud case).

little power that the arrangement distributes power as would a limited partnership, or the investors are so inexperienced in business affairs that they cannot intelligently exercise the partnership powers, or the investors are so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that they cannot replace the manager of the enterprise or otherwise exercise meaningful partnership powers, then a general partnership may in fact be an investment contract. Williamson, 645 F.2d at 424.

31. The Partnership Agreements vest power in the investors to manage and control their investments. The SEC, therefore, must show that one of the exceptions to the general rule that units in partnerships are not securities applies in this case. Gordon v. Terry, 684 F.2d 736, 742 (11th Cir. 1982).

32. Here, the Court concludes that on the record as it now stands the SEC has shown that the units at issue here are securities. Specifically, the Court concludes that investors relied upon representations made to them at the time of investment regarding the abilities of Defendant Wetherald to manage the telephone companies, that investors were dependent upon the unique entrepreneurial and managerial skills of Defendants Shiner, Swichkow, and Wetherald, that any power the investors exercised was illusory, and that the efforts made by Defendants Shiner, Swichkow, and Wetherald were the significant ones that affected the success or failure of the LLPs. Friendly Power Co. LLC, 49 F. Supp. 2d. at 1369.

33. Approximately eighty-five percent (85%) of the proceeds from investors were transferred almost immediately to entities owned and/or controlled by Defendants Shiner, Swichkow, and Wetherald. The Court doubts whether the investors could even successfully run the telephone companies when

they controlled only fifteen percent (15%) of the money invested. In this sense, even though the partnership Agreement gives the investors certain powers, it also renders them powerless due to the fact that there are insufficient funds available to run the telephone companies. Moreover, what is beyond doubt in this case is that eighty-five percent (85%) of the investment proceeds went into the hands of Defendants Swichkow, Shiner, and Wetherald for management services of the LLPs. Indeed, to qualify to buy a unit an investor had to ratify all acts undertaken by On Systems Technology, LLC serving as the telephone company manager, and an investor had to agree to be bound by any existing contracts entered into by the Initial Managing Partner. As noted above, entities such as On Systems Technology, LLC, Telecom Advisory, Equity, and Marketing Media, which are all owned and/or operated by Defendants Swichkow, Shiner, and Wetherald, were receiving the vast majority of the proceeds from the investments for their management services and Defendants' ownership of these entities was not disclosed to investors. (DE 18, Ex. 42 to Decl. Of Bernard A. McDonough in Support of Ex Parte Application of the S.E.C. for a T.R.O. and other Emergency Relief, Mile High Partners Cumulative recap (04/12/2001 – 12/31/2001)). Simply stated, Defendants Swichkow, Shiner, and Wetherald controlled the vast majority of the money necessary to operate the LLPs and were responsible for virtually all of the management services connected to the LLPs and the telephone companies.

Moreover, Deponents stated that they were effectively precluded from participating in the affairs of the LLPs due to the unavailability of these Defendants and Defendants withholding of information. For example, Deponents stated that they could not obtain contact information regarding other investors who were supposed to be managing the LLPs, that Defendants would not return their

phone calls, and that Defendants were at times unresponsive to their efforts to participate in the management of the LLPs.

34. The economic reality of the LLPs was that Defendants Shiner, Swichkow, and Wetherald monopolized both the money and information necessary to operate the telephone companies, the investors were unable to exercise any meaningful control over the LLPs due to the Defendants' behavior, the investors were wholly dependent upon Defendants for the success or failure of the LLPs, and the efforts of Defendants Shiner, Swichkow, and Wetherald were the significant ones.

35. The nature of the investment at the time it is offered or sold is also relevant to determining whether or not a security is at issue. Williamson, 645 F.2d at 424 n.14. Here, the Offering Materials touted Wetherald as having fifteen (15) years experience in the telecommunications industry. Also, Deponents stated that they relied upon statements by salespersons at Defendant Telecom Advisory that Wetherald had the experience to manage the telephone companies. Moreover, On Systems Technology, LLC was already in place as the telephone company manager at the time of investment and Defendant Swichkow was serving as Initial Managing Partner for five of the six LLPs. It is clear to the Court that investors were induced at the time the units were offered to invest in the LLPs due to the representations that Wetherald and On Systems Technology, LLC would run the telephone companies and that Defendant Swichkow was servicing as Initial Managing Partner.

36. While it is true that investors exercised certain powers and did in fact remove Defendant Wetherald and On Systems Technology, LLC as the managing company of certain LLPs, this fact does not establish that the investors

were not dependent upon Defendants for the success or failure of the LLPs. Deponents stated that by the time the investors were able to remove Defendant Wetherald and On Systems Technology, LLC as management company to certain LLPs the vast majority of the proceeds from the investments were in the hands of Defendants Swichkow, Shiner, and Wetherald and the businesses had in effect disintegrated. In reality, therefore, the power to replace On Systems Technology, LLC as telephone company manager is illusory and does not establish that the investors were not dependent upon Defendants for the success or failure of the LLPs.

37. The Court, therefore, concludes that the units at issue here are securities.

38. To establish a prima facie case of violation of Section 5 of the Securities Act, 15 U.S.C. § 77(e), the SEC need only allege (1) the sale or offer to sell securities; (2) the absence of a registration statement covering the securities; and (3) the use of facilities of interstate commerce in connection with the sale or offer of the securities. Raiford v. Buslease, Inc., 825 F.2d 351, 354 (11th Cir. 1987). Here, the SEC has clearly established a prima facie case of a violation of Section 5 of the Securities Act, 15 U.S.C. § 77e. Securities were offered and sold. There is no evidence of a registration statement. Telephone and facsimile were used to sell the securities.

39. Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, all prohibit the fraudulent offer, purchase or sale of securities and proscribe, inter alia, the employment of any device, scheme or artifice to defraud, as well as the making of untrue statements of material fact or omission of a

material fact in connection with the offering or sale of securities. To state a violation of these anti-fraud provisions, the SEC must show (1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which an investor relied; (5) that proximately caused injury. Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action. SEC v. Carriba Air, Inc., 681 F.2d 1318, 1323 (11th Cir. 1982). Scienter may be established by a showing of knowing misconduct or severe recklessness; that is, proof of recklessness would require a showing that a defendant's conduct was an extreme departure of the standards of ordinary care which presents a danger of misleading buyers or sellers that is either known to a defendant or is so obvious that the actor must have been aware of it. Id. at 1324.

40. Here, the SEC has established a prima facie case of violations of the anti-fraud provisions. The SEC has shown that misrepresentations or omissions of material fact were made by Defendants with scienter, which were relied upon by investors, and that the investors have been injured by those misrepresentations and omissions because the investors would not have invested and lost their money had they not been misled.

41. Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a) prohibits any broker from using interstate commerce to sell securities unless the broker is registered with the SEC. SEC v. United Monetary Servs., Inc., 1990 WL 91812, at *8 (S.D. Fla. May 18, 1990). A "broker" is "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." 15 U.S.C. § 78c(a)(4).

42. Defendants are brokers under federal securities law because they engaged in the business of effecting transactions in securities, i.e. selling the “units” to investors. Because Defendants have not registered as brokers with the SEC they have violated Section 15(a).

43. Section 15(c) prohibits a broker from using the facilities of interstate commerce to sell securities by means of any manipulative, deceptive, or other fraudulent device or contrivance. Since the SEC has established that Defendants violated the anti-fraud provisions, the Defendants have violated Section 15 (c).

44. In sum, the SEC has established a prima facie case of previous violations of the federal securities laws.

45. Next, the SEC must establish a reasonable likelihood that the wrong will be repeated. In deciding whether to grant injunctive relief, the Court must consider: (1) the egregious nature of Defendants’ actions; (2) the isolated or recurrent nature of the violations; (3) the degree of scienter involved; (4) the sincerity of Defendants’ assurances; (5) Defendants’ recognition of the wrongful nature of their conduct; and (6) the likelihood that Defendants’ present occupations will present opportunities for future violations. Carriba Air, Inc., 681 F.2d at 1322.

46. Here, the SEC has shown a reasonable likelihood of future violations. Defendants’ conduct is egregious; Defendants have repeatedly engaged in such conduct; Defendants knew what they were doing; there have been no assurances that Defendants will not continue to violate federal securities laws in the future; Defendants have not recognized the wrongful nature of their acts; and Defendants present occupations present opportunities for future violations.

47. In conclusion, the SEC has established a prima facie case of previous violations of federal securities law, as well as a reasonable likelihood that the wrong will be repeated. The SEC, therefore, has satisfied both requirements for the issuance of a preliminary injunction pending the outcome of this litigation.

48. The Court notes, however, that additional discovery will be taken in this matter and that neither party should infer from this preliminary decision that the Court's findings and rulings will remain consistent after a full trial on the merits of this action.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

I. Preliminary Injunction

Pending a Final Judgment entered by the Court, Defendants, their directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with each of them, are hereby restrained and enjoined from:

A. Directly or indirectly (1) making use of any means or instruments of transportation or communications in interstate commerce or of the mails to sell securities in the form of units, common stock, warrants or any other securities, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect with the Securities and Exchange Commission as to such securities; (2) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy, through the use or medium of any prospectus or otherwise, any securities, in the form of units, common stock, warrants or any other securities, unless a

registration statement is filed with the Securities and Exchange Commission as to such securities (in violation of Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a) and 77e(c);

B. Directly or indirectly, by use of any means or instruments of transportation or communication in interstate commerce, or by use of the mails, in the offer or sale of securities, knowingly or recklessly employing devices, schemes or artifices to defraud (in violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a);

C. directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security registered on a national securities exchange or not so registered, knowingly or recklessly: (i) employing devices, schemes or artifices to defraud; (ii) making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engaging in acts, practices and courses of business which have operated, are now operating or will operate as a fraud upon the purchasers of such securities (in violation of Sections 10(b) and 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78o(c) and Rule 10b-5, 17 C.F.R. § 240.10b-5));

D. acting as a broker-dealer by making use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (in violation of Section 15(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 780(a));

E. soliciting, receiving, or depositing into any account any additional investor funds, money, or proceeds from the marketing or sale of partnership interests in any telephone company or enterprise;

F. advertising or promoting in any manner or method their purported investment schemes, plans, or proposals as described in the Complaint in the above-styled cause, including by newspaper, magazine or other publication or through the use of any other means of communication, including telephone, facsimile transmission, electronic messaging or otherwise.

II. Continuation/Modification of Asset Freeze

IT IS FURTHER ORDERED AND ADJUDGED that, pending a Final Judgment entered by the Court, the asset freeze entered as part of the Court's February 10, 2003 Temporary Restraining Order (DE 21) shall continue uninterrupted, with the following modifications:

A. all personal bank accounts held in the name of Defendant Marc David Shiner and/or Leon Swickow, or for which they have signatory authority, are released from the Court's asset freeze;

B. all corporate bank accounts held in the name of Defendant Telecom Advisory Services, Inc. and/or Relief Defendants Equity Service Administration, Inc., Marketing Media, Inc., or USA Media Group, Inc. are released from the Court's asset freeze;

C. all corporate bank accounts held in the name of 2U Communications, LLC, d/b/a 2U Wireless, are released from the Court's asset freeze;

D. all debtor-in-possession bank accounts held in the name of, or for the benefit of, Mile High Telecom Joint Venture are released from the Court's asset freeze;

E. account number 6050009078, in the name of Britton Wetherald, at 1st United Bank in Aurora, Colorado is released from the Court's asset freeze;

F. account number 072453 at Commerce Bank in Aurora, Colorado and account number 4000121974 at Community First Bank in Denver, Colorado, both in the name of Phone Company Management Group, LLC, are released from the Court's asset freeze;

G. corporate account numbers 4050001050, 405002088, 4050001923 and 40000121958 in the name of On Systems, LLC at 1st United Bank in Aurora, Colorado are released from the Court's asset freeze;

H. corporate account numbers 4050001042 at 1st United Bank in Aurora, Colorado and 07247 at Commerce Bank in Aurora, Colorado, both in the name of On Systems Technology, LLC, are released from the Court's asset freeze; and

I. a \$100,000.00 certificate of deposit held in the name of On Systems Technology, LLC at 1st United Bank in Aurora, Colorado is released from the Court's asset freeze to the extent that it is pledged or otherwise encumbered by contractual obligations which pre-date the Court's February 10, 2003 Temporary Restraining Order.

With respect to Relief Defendant Louis Stinson, Jr., P.A., the asset freeze shall continue to be limited to the following account numbers at Regent Bank, held for the following Limited Liability Partnerships ("LLP") by Louis Stinson, Jr., P.A. as escrow agent:

<u>LLP</u>	<u>Account Number</u>
Mile High Telecom Partners, LLP	202855706
Phone Company of Arizona, LLP	203071306
Phone Company of Washington, LLP	3200306406
Phone Company of Minnesota, LLP	3200324206
Iowa/Nebraska Phone Company, LLP	3200389706
Phone Company of Oregon, LLP	3200329306

All financial institutions which receive notice of this Order are directed to provide counsel for the Securities and Exchange Commission, upon the Securities and Exchange Commission's request and without the issuance of a subpoena, with account opening documentation, account balance information and any documents concerning transactions in accounts held in the name of Defendants Marc David Shiner, Leon Swickow, or Timothy Wetherald, or in which they hold a beneficial interest or over which they exercise signatory authority or power of attorney.

III. Records Preservation

IT IS FURTHER ORDERED AND ADJUDGED that, pending a Final Judgment entered by the Court, the parties, their directors, officers, agents, servants, employees, attorneys, depositories, banks, and those persons in active concert or participation with any one or more of them, and each of them by and hereby are restrained and enjoined from directly or indirectly destroying, mutilating, concealing, altering, disposing of, or otherwise rendering illegible in any manner, any of the books, records, documents, correspondence, brochures, manuals, papers, ledgers, accounts, statements, obligations, files and other property

of or pertaining to the Defendants and Relief Defendants wherever located, until further Order of the Court.

IV. Expedited Discovery

IT IS FURTHER ORDERED AND ADJUDGED that:

A. the parties may continue to take depositions upon oral examination of, and obtain the production of documents from, parties and non-parties subject to three (3) business days notice. Should any Defendant and Relief Defendant fail to appear for a properly noticed deposition, that party may be prohibited from introducing evidence at the trial of this matter;

B. the parties shall continue to be entitled to serve interrogatories, requests for the production of documents and requests for admissions. The parties shall respond to such discovery requests within five (5) business days of service;

C. all responses to the Securities and Exchange Commission's discovery requests shall be delivered to Kathleen Ford at 450 Fifth Street, N.W., Mail Stop 9-11, Washington, D.C. 20549-0911, by the most expeditious means available;

D. service of discovery requests shall be sufficient if made upon the parties by facsimile or overnight courier, depositions may be taken by telephone or other remote electronic means; and

E. the parties hereby waive right to a jury trial and to trial before the Court specially set for Monday, June 9, 2003.

V. Retention of Jurisdiction

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction over the above-styled cause and Defendants and Relief

Defendants in order to implement and carry out the terms of all Orders and Decrees that may be entered and/or to entertain any suitable Application or Motion for additional relief within the jurisdiction of the Court, and will order other relief that the Court deems appropriate under the circumstances.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this (eighth) day of May, 2003.

/S/ WILLIAM J ZLOCH

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

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Mark Braswell, Esq..
Bernard A. McDonough, Esq.
Michel O. Weisz, Esq.
Glenn W. Merrick, Esq.
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ATTACHMENT 7

RESPONSE 1.1

Mile High Partners

[]

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